NO. 85-7165

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ANTHONY GRANDISON, SR.

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

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Nancy L. Cook

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ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

MOTION FOR LEAVE TO PROCEED

IN FORMA PAUPERIS

The Petitioner, Anthony Grandison, Sr., who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached Petition for Writ of Certiorari to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

Counsel's affidavit in support of this Petition is attached hereto.

Nancy L. Cook
Assigned Public Defender
Practicing Law Center
Washington College of Law
4400 Massachusetts Ave., N.W.
Washington, D.C. 20016
(202) 885-1500

Counsel for Petitioner

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Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

AFFIDAVIT IN SUPPORT OF MOTION TO
PROCEED ON APPEAL IN FORMA PAUPERIS

I, Nancy L. Cook, being first duly sworn, depose and say that I am counsel for the Petitioner in the above captioned case. Before the decision of the Maryland Court of Appeals was rendered in the above captioned case, Petitioner was transferred to federal custody and transported to the federal penitentiary in Lewisburg, Pennsylvania, where he remains incarcerated. Counsel has contacted Petitioner and asked that he execute and forward an

affidavit to support his Motion For Leave To Proceed in Forma Pauperis. Petitioner's personally executed affidavit has not to date been received, however,

In support of Petitioner's motion, counsel states, on information and belief, that because of Petitioner's poverty he is unable to pay the costs of these proceedings or to give security therefore and that Petitioner is entitled to redress.

Counsel further swears upon information and belief that the following statements relating to Petitioner's ability to pay the cost of prosecuting his appeal are true:

1. Although Petitioner represented himself at trial, he qualified for representation and payment of costs as an indigent at trial. Standby counsel was appointed by the trial court in February, 1984 to assist Petitioner, and standby counsel's fees and expenses were paid for by the Office of the Public Defender for the State of Maryland.

2. Petitioner qualified for representation as an indigent under the standards of the Maryland Public Defender's Office for purposes of appeal. Present counsel, who represented Petitioner on appeal, was appointed to the case as an assigned Public Defender under the auspices of the state public defender office.

3. Petitioner also qualified for representation as an indigent in the federal trial and appellate courts from 1983 to the present time. Petitioner had the assistance of a court appointed standby attorney at his trial on the federal charges related to this case and has been represented on appeal by appointed counsel since 1985.

4. Petitioner has been incarcerated in either state or federal penal institutions continually since November of 1983. He has consequently been unable to obtain the funds necessary to pursue his appeal.

I understand that a false statement in this affidavit will subject me to penalties for perjury.

Nancy L. Cook

Nancy L. Cook

Subscribed and sworn to before me, a Notory Public, this 2nd day of June, 1986.

Notary Public

My Commission Expires April 14, 1989

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OCTOBER TERM, 1985

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Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI

TO THE COURT OF APPEALS OF MARYLAND

NOTICE OF APPEARANCE

MR. CLERK:

Please enter my appearance as counsel for Petitioner in the above captioned case.

Nancy L. Cook

Nancy L. Cook
Assigned Public Defender
Practicing Law Center
Washington College of Law
4400 Massachusetts Ave., N.W.
Washington, D.C. 20016
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Counsel for Petitioner

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ANTHONY GRANDISON, SR.	•	IN THE
Appellant	•	SUPREME COURT OF
v.	•	THE UNITED STATES
STATE OF MARYLAND	•	SEPTEMBER TERM, 1985
Appellee	•	No.

****

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 2 day of June, 1986, three copies of the foregoing Petition for Writ of Certiorari were delivered to the Office of the Attorney General, 7 North Calvert Street, The Munsey Building, Baltimore, Maryland 21202.

Nancy L Cook

Nancy L. Cook
Assigned Public Defender
Practicing Law Center
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4400 Massachusetts Ave., N.W.
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(202) 885-1500

Counsel for Petitioner

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

PETITION FOR WRIT OF CERTIORARI

Anthony Grandison, Sr., Petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the Court of Appeals of Maryland entered on April 1, 1986, in the case of Anthony Grandison, Sr. v. State of Maryland, Nos. 65 and 108, September Term, 1984.

OPINION BELOW

The opinion of the Court of Appeals of Maryland is reported at ___Md.___, 506 A.2d 580(1985). It is reproduced in Petitioner's Appendix at pages App. 17 et seq.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1257 (3).

CONSTITUTIONAL PROVISION, STATUTES AND RULES

The following constitutional provisions, statutes and rules, relevant to this case, are reproduced in Petitioner's Appendix:

United States Constitution, Amendments V, VI, VIII, XIV

Maryland Code (1957, 1982 Repl. Vol.), Art. 27, §§412, 413, 414

Maryland Rules of Procedure, Rule 4-343

QUESTIONS PRESENTED

1. Does the denial of a request for legal representation for a capital sentencing in a statutorily bifurcated proceeding constitute a violation of the Sixth Amendment right to the assistance of counsel?

2. Is the right to self representation infringed by the denial to a pro se litigant of personal access to the only potential defense witness available who could exculpate the defendant, absent a finding of necessity for security reasons?

3. Does the Maryland death penalty statute, as construed and applied in Petitioner's case, violate the Eighth and Fourteenth Amendments to the United States Constitution?

4. Do rulings and instructions by the trial court which deprive the jury in a capital case of the power to show compassion or extend mercy to the accused violate the Eighth and Fourteenth Amendments to the United States Constitution?

STATEMENT OF THE CASE

Petitioner, Anthony Grandison, Sr., was indicted by a Baltimore County, Maryland, grand jury for crimes arising out of the shooting deaths of Scott Piechowicz and Susan Carol Kennedy that had occurred on April 28, 1983 in Baltimore County. The indictment, filed on June 30, 1983, charged Petitioner with conspiracy to murder Scott and Cheryl Piechowicz, first degree murder of both Scott Piechowicz and Susan Kennedy, and use of a handgun in the commission of a crime of violence.

Prior to the filing of the State charges, indictments were filed in the U.S. District Court of Maryland charging Petitioner with conspiracy to violate the civil rights of Scott and Cheryl Piechowicz (18 U.S.C. §241) and use of force with intent to obstruct witnesses (18 U.S.C. §1512).

Petitioner was arraigned on July 19, 1983 before the Honorable John F. Fader, II in the Circuit Court for Baltimore County. At that time Petitioner was advised of his right to the assistance of counsel. Petitioner indicated however, that he intended to represent himself. After several hearings in Baltimore County concerning Petitioner's request for "hybrid" representation, it was determined that Petitioner would represent himself.

In the meantime, on September 7, 1983, the State filed a Notice of Intention to Seek a Sentence of Death. Following receipt of that Notice, Petitioner moved to have the case removed from Baltimore County. His request, filed on November 23, 1983, was granted by order dated December 16, 1983. On December 19,

1983, the record was transmitted to the Circuit Court for Somerset County, Maryland.

Prior to the removal of the State case, Petitioner was tried in the United States District Court on the federal charges. He was convicted of those charges on November 1, 1983, and sentenced to life imprisonment plus ten years on December 15, 1983.

Petitioner first appeared in Somerset County on February 3, 1984, at which time he was again advised concerning his right to counsel. Petitioner requested and was granted the assistance of "standby" counsel. An order appointing counsel was filed on February 7, 1984, and on February 15, 1984, H. Warren Crawford entered an appearance in the case.

Trial ran from May 3 through May 22, 1984. Petitioner's motion for judgment of acquittal at the end of the case was denied as to all counts and the case was submitted to the jury, which found Petitioner guilty of all four counts charged in the indictments.

Sentencing was scheduled to begin on May 28, but was postponed for eight days at Petitioner's request. On June 5, the court heard motions relating to the capital proceedings, all of which were denied. On June 6, testimony was presented, arguments made and instructions given to the jury. After the jury retired to deliberate on the murder counts, the court sentenced Petitioner to life imprisonment for the conspiracy conviction and twenty years for the handgun violation consecutive to the life sentence. Both sentences were imposed to run consecutively to the previously imposed life plus ten years in the federal case.

The jury returned verdicts of death for both murder counts. Writs of execution were accordingly filed, but stayed pursuant to Md. Ann. Code, Art. 27, §414 pending review by the Maryland Court of Appeals. Notice of appeal of the conviction and sentences was filed on June 13, 1984.

Petitioner's case was heard by the Maryland Court of Appeals on November 5, 1985. In a reported opinion filed on April 1, 1986, the judgments of the lower court were affirmed.

STATEMENT OF FACTS

On April 28, 1983, at shortly after 3:00 p.m., Scott Piechowicz and his sister-in-law, Susan Kennedy, were shot and killed in the lobby of the Warren House Motel on Reistertown Road in Baltimore County, Maryland, where they were both employed.

At the time the shooting deaths occurred, Petitioner was incarcerated at the Baltimore City Jail, where he was awaiting trial on federal drug charges. Following a joint investigation by federal, state and local authorities, Petitioner was charged with the two murders. It was the State's theory that Petitioner had arranged, from his position at the Baltimore City Jail, to have Scott Piechowicz and his wife Cheryl[1] murdered because the two were expected to be identification witnesses for the government at Petitioner's forthcoming federal trial. The State

---

[1] Cheryl Piechowicz also worked at the Warren House Motel. The prosecutor's theory was that Cheryl's sister, Susan, was working in Cheryl's stead on the day of the shootings and was mistaken for her absent sister.

alleged that Petitioner entered into a conspiracy to accomplish this purpose with at least four others: Vernon Evans; Evans' girlfriend, Charlene Sparrow; Rodney Kelly; and Petitioner's common law wife, Janet Moore.

Petitioner represented himself in the state proceedings. He advised the court of his intention to represent himself when he first appeared before Judge John F. Fader, II in Baltimore County on July 19, 1983. The court told Petitioner that it would notify the Public Defender's Office nevertheless so that Petitioner could avail himself of the services of the Public Defender "at any time throughout these proceedings." The state's attorney later asked the court to clarify whether "there will be counsel for Mr. Grandison should at some point he decide to want counseling." The court's response was affirmative.

At a later hearing, Petitioner requested the appointment of "standby" counsel, explaining that he wished to proceed as in a co-counsel situation, with himself as lead counsel. The Public Defender's office declined to provide representation under those circumstances. The hearing was concluded without resolution of the question. Less than two weeks later, Petitioner appeared before Judge Fader who advised him again of his right to counsel. Although Petitioner did not make a final election at that time, the court went ahead and set dates for motions and trial.

On November 9, 1983, Petitioner again appeared before Judge Fader. At that hearing, extensive discussion took place regarding Petitioner's desire to have some legal assistance at

his trial. Petitioner reiterated that he wanted an attorney who would act "like a co-counsel." The Public Defender's Office again declined to provide representation under the parameters outline by Petitioner. After lengthy discussion, the court advised Petitioner that counsel would either be appointed under terms dictated by the Public Defender's Office or that he would have to represent himself. Petitioner stated that he would not take appointed counsel under the conditions imposed by the Public Defender's Office. The court ruled that Petitioner had chosen the legal equivalent of self-representation.

A final hearing in Baltimore County left the question of counsel still unresolved. Petitioner indicated to the court that he did not wish to make an election on that day.

Petitioner's case was subsequently removed to Somerset County, Maryland. On February 3, 1984, Petitioner appeared before Judge Lloyd Simpkins in the Circuit Court. Judge Simpkins conducted a waiver inquiry, at the end of which Petitioner stated his desire to have "standby" counsel. The court agreed to provide standby counsel, and found that Petitioner had made a knowing, intelligent and intentional waiver of the right to counsel. Standby counsel was thereafter appointed to assist Petitioner.

The State's case against Petitioner was circumstantial and rested in large measure on the testimony of Charlene Sparrow, an alleged co-conspirator and girlfriend of Vernon Evans. Sparrow and other witnesses placed Evans in the lobby of the Warren House Motel shortly before the shootings. Evidence was presented to

establish that Petitioner had had contact with Evans and Janet Moore both prior to and after the shootings and that Petitioner otherwise was linked to other alleged co-conspirators.

Petitioner called a number of witnesses during his case, most of whom were called for impeachment purposes. Petitioner also considered the possibility of calling Rodney Kelly as a witness on his behalf. Kelly was believed by the state to have been a member of the alleged conspiracy to murder the Piechowiczes and had in fact entered an Alford[2] plea to charge of conspiracy pursuant to plea negotiations with the state.

Petitioner and Kelly were both incarcerated during the pendency of the proceedings, and had had no occasion to talk. When Kelly was brought to the Somerset County Courthouse, pursuant to a writ issued at Petitioner's request, Petitioner sought permission to interview him. Despite the fact that Petitioner had been interviewing potential defense witnesses throughout the trial, and although extensive security precautions had been taken at the courthouse, the court denied Petitioner's request. Petitioner ultimately elected not to call Kelly as a witness.

The case was submitted to the jury on May 22, 1984. That day, the jury returned verdicts of guilty on all counts.

After verdicts had been received, the trial court entertained arguments on requested instructions. Petitioner asked for, and was refused, two instructions vesting the jury

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[2] Under North Carolina v. Alford, 400 U.S. 25 (1970), Kelly pled guilty but did not admit his guilt.

with discretion in the determination of sentence. The first advised the jury that:

> it is proper for you to exercise your own moral, factual and legal judgment in determining whether that [aggravating] circumstance is sufficient in your minds to call for the punishment of death.

The second was based on former Maryland Rule 759f[3] and stated:

> You need not find a mitigating circumstance in order to impose a sentence of life imprisonment. Nothing in the law forbids you from extending mercy out of compassion or belief that life imprisonment is sufficient punishment under all the circumstances.

The court, in excising the requested instructions, explicitly opined that the jury had no discretion to show compassion or mercy.[4]

---

[3] Former Rule 759f, now Rule 4-327(e), provided:

> Recommendation of Mercy
> A jury may attach to its verdict a recommendation to the court to show mercy to a defendant. The recommendation is not binding upon the court.

[4] The question of the existence and/or extent of the jury's authority to exercise discretion in determining that the death penalty was not appropriate first arose in this case in the context of the jury voir dire. Petitioner objected on several occasions to the State's attorney repeatedly asking prospective jurors if they could impose the death penalty "if the law required" it. Standby counsel explained Petitioner's objection to the court:

> MR. CRAWFORD: Judge, what Mr. Grandison's objection to is Mr. Levitz [assistant State's attorney] said "If the law required." I don't know, I agree with him on that. If the law allowed the death penalty, yes, but not required. There is nothing in the Maryland law that requires the death penalty. It only says that under certain circumstances it may be imposed. It may be imposed by either a Judge or the jury. He is giving the implication to these people it is required.
>
> MR. LEVITZ: I totally disagree with Mr.

(cont.)

Sentencing was scheduled for Monday, May 28, 1984. Petitioner had elected to be sentenced by the jury. Petitioner and his standby counsel had agreed that counsel would handle the sentencing if that became necessary. However, on the date sentencing was scheduled to begin, counsel advised the court that he was unprepared and had been out of town since the day after the verdicts were rendered. Petitioner asked for additional time to prepare and to have counsel appointed for purposes of sentencing.

In making the request for counsel, Petitioner made his position very clear:

> THE COURT: You are asking me now to appoint Mr. Crawford to represent you?
>
> MR. GRANDISON: In the sentencing proceeding, yes, Your Honor. And, if I may add, I am not asking the Court to appoint Mr. Crawford to represent me in the sentencing proceedings to delay the trial. I am interested in leaving here with any type of sentence that the Court -- I would like to be given an opportunity to present a defense in mitigation of punishment.

The court's ruling was likewise very clear:

> THE COURT: Once the decision is made regarding self-representation, if it is properly made prior to trial, the request to change rests solely within the discretion of the trial court. The right must be timely asserted. It must be asserted before the trial starts. Of course, this is not timely asserted. Whether we

4(cont.)

> Crawford's remarks. I think the death penalty in Maryland, it is not a question of whether the jury wants to give it or doesn't want to give it. The death penalty in Maryland is specifically either required or not required, based on the findings of the jury. They are not allowed to elect what they want to do. I think if you read the death statute, that is clear.

The court ultimately concluded that the State's position was correct.

> continue with it or not, what I am inclined to do about self-representation is leave it just like it is, and let Mr. Crawford take over and handle the proceeding as standby counsel with Mr. Grandison's permission. Grandison will still be the attorney.

To standby counsel, the court stated:

> THE COURT: Keep in mind, Mr. Crawford, you are not the attorney in this. Mr. Grandison is his own attorney. You are just kind of a law clerk. Now, he can't blame it all on you because you weren't around and haven't done all these things...

The court did postpone the sentencing for eight days, but denied Petitioner's request for appointment of counsel. Just prior to the sentencing hearing itself, the court reiterated that "Mr. Grandison is again proceeding pro se, with Mr. Crawford as his standby counsel." Petitioner then reasserted his "right to terminate [his] self representation, because under this death penalty situation, it is like two trials."

At the hearing, standby counsel continued to act only at the behest of Petitioner. Most of counsel's statements and arguments were couched in terms of what Petitioner wanted him to say or object to.[5]

On June 5, Petitioner also made several challenges to the death penalty statute. Among other things, Petitioner raised questions about the burden of proof, unconstitutional restrictions on jury discretion, the manner of infliction of the

---

[5] The following quotations from the sentencing record illustrate this point:

> "I think that was all the points that Mr. Grandison had raised with me ..."; Mr. Grandison wants me to object on the ground of hearsay to all of this ..."; "... he [Petitioner] is taking exception to one of the things you said ..."; "Mr. Grandison wants me to move for a mistrial ..."

punishment and proportionality. The trial judge ruled that the death penalty statutes were in all respects constitutional, noting that this Court, by denying a writ of certiorari in the Tichnell case[6], had "said the Maryland Statute is constitutional."

ARGUMENT

I. THE DENIAL OF A REQUEST FOR LEGAL REPRESENTATION FOR A CAPITAL SENTENCING IN A STATUTORILY BIFURCATED PROCEEDING CONSTITUTES A VIOLATION OF THE SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL.

Although Petitioner is the first, and thus far, only defendant in a capital case in Maryland to have elected self representation at trial, the importance of this issue on future litigation should not be underestimated. The decision could affect any litigant in any bifurcated proceeding at which procedural rights might apply. Moreover, the importance of the right to counsel to any person facing the possibility of a death sentence can hardly be overstated. The denial of the assistance of counsel at any stage of a capital proceeding should be carefully scrutinized; if there is any ambiguity about when the right to counsel applies, such ambiguity should be clarified. This case, which presents a clear factual situation, provides an opportunity for this Court to ensure that the right to counsel is

---

[6] On May 14, 1984, this Court denied Richard Danny Tichnell's petition for a writ of certiorari. ___U.S.___, 104 S.Ct. 2374 (1984). Tichnell was the first person to receive the death penalty under the present statutory scheme in Maryland.

strictly protected.

At the outset, it should be noted that several things are not, and have never been, in dispute in this case. It is not disputed that the right to the effective assistance of counsel applies at the sentencing stage of a trial. It has never been suggested by the State or the Maryland courts that Petitioner did in fact receive the effective assistance of counsel at his sentencing. It has likewise not been disputed that Petitioner unequivocally sought the appointment of counsel for sentencing and explicitly expressed a desire to waive his right of self representation at the sentencing proceeding.[7] No claim has been made, moreover, that the appointment of counsel would have delayed the proceedings or that it was Petitioner's intention to do so.

The question presented in this case thus comes down to whether a capital sentencing in a statutorily bifurcated proceeding constitutes a "separate" proceeding, as that term has been interpreted in this Court's decisions in, inter alia, Specht v. Patterson, 386 U.S. 605 (1967) and Bullington v. Missouri, 451 U.S. 430 (1981); if it is such a separate proceeding, Petitioner was unquestionably denied the right to be represented by counsel at his sentencing.[8]

---

[7] Contrary to the Court of Appeals' statement that "Grandison and his standby counsel had agreed, after the guilty verdict, that standby counsel would handle the sentencing," 506 A.2d at 613, Petitioner advised the trial court on May 28, 1984, and standby counsel confirmed, that this agreement predated the jury's verdict.

[8] Although Petitioner specifically asserted his "right to terminate self representation, because under this death penalty situation, it is like two trials," and despite the fact that this issue was clearly presented to the Court of

The Maryland capital punishment statute, Md. Code, Art. 27, §412 et seq, and the complimentary Rule of Procedure, Rule 4-343,[9] adopted by the Court of Appeals, explicitly set forth a bifurcated procedure in capital cases. The law provides for an election to be made by the defendant of a judge or jury to determine sentence and for a hearing before the elected fact finder at which evidence is to be presented and specific findings of fact are to be made. Both the legislatively enacted statute and the court adopted Rule refer to this contemplated hearing as a "separate sentencing proceeding." Md. Code, Art. 27, §413(a); Md. Rule 4-343.

Given the nature of the sentencing proceeding in Maryland, the Court of Appeals' decision to let stand a ruling that a waiver of counsel at trial constitutes a waiver of counsel for the subsequent, separate sentencing proceeding, squarely conflicts with prior decisions of this Court.

In Specht v. Patterson, the defendant, who was convicted of a sex offense, was subjected to a hearing at which it was to be determined whether he was a habitual offender, was mentally ill, or posed a threat of bodily harm. The factual determinations made at the hearing were to be used at sentencing. The denial to the defendant of minimal procedural rights, including the right

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8(cont.)
Appeals both in Petitioner's brief and at oral argument, the appellate court did not address the question of whether the sentencing is a separate proceeding in capital cases. The court rested its decision on this issue primarily on the conclusion that Petitioner's argument was not supported by Faretta v. California, 422 U.S. 806 (1975), a case that was neither cited in the brief nor relied upon at real argument with respect to this issue.

9 At the time of Petitioner's trial, this Rule was enumerated Rule 772.

to counsel, was held to constitute a violation of the defendant's constitutional rights.

In Bullington v. Missouri, the defendant was convicted and sentenced to life imprisonment under a procedural scheme very similar to Maryland's present one. When, following a successful appeal, the case was remanded, the State sought the death penalty at the second trial. This Court ruled that the State was barred from "retrying" the issue of sentencing. The rationale for the decision was that the bifurcated sentencing was in all relevant respects like the preceding trial on the issue of guilt; the jury was required to make new findings of fact and the same standard of proof was applied. Accordingly, the jury's decision at the initial sentencing to impose life rather than death was deemed to be an "acquittal" for purposes of double jeopardy. If the bifurcated sentencing is a separate proceeding for purposes of double jeopardy, it seems obvious that it is likewise a separate proceeding for purposes of representation by counsel.

The result in this case is in fact also at odds with another recent decision of the Maryland Court of Appeals. In Harris v. State, 295 Md. 329, 455 A.2d 979 (1984), the court recognized the need for a separate waiver inquiry at the sentencing proceeding for purposes of the defendant's election of judge or jury at that proceeding. Even the dissent in that case acknowledged the fact that trial and sentencing in a capital case are separate proceedings and approved the application of waiver provisions in Maryland's rules of procedure to capital sentencing proceedings.

Despite these clear indications that the sentencing in a capital case in Maryland is a proceeding separate from the trial itself, and despite the recognized importance of the right to counsel, Petitioner was required, without specifically being advised that his initial waiver of counsel at trial would produce such a consequence, to proceed at sentencing without the assistance of counsel that he sought.

II. ABSENT A FINDING OF NECESSITY FOR SECURITY REASONS, THE RIGHT TO SELF REPRESENTATION IS INFRINGED BY THE DENIAL TO A PRO SE LITIGANT OF PERSONAL ACCESS TO THE ONLY POTENTIAL DEFENSE WITNESS AVAILABLE WHO CAN EXCULPATE THE DEFENDANT.

There is no question that the right to a fair trial includes the right to call witnesses and present a defense. U.S. Const., Amends., V and XIV; Md. Declar. of Rts., Arts. 21, 42; Washington v. Texas, 388 U.S. 14 (1967). It is generally recognized, moreover, that the right to present a defense encompasses the right to interview as well as summon witnesses, even if those witnesses are incarcerated. E.g., State v. Lerner, 308 A.2d 324 (R.I 1983); Commonwealth v. Doherty, 229 N.E. 2d 267 (Mass. 1967), cert. denied, 390 U.S. 982 (1968); Hodgins v. State. 139 Fla. 226, 190 So. 875 (1939); State v. Gangner, 73 Mont. 187, 235 P. 703 (1925).

In the ordinary case, it may not be necessary to allow the defendant personal access to witnesses. As long as the accused is represented by counsel, the responsibility for summoning and, therefore, interviewing witness falls on counsel. See Alvord v. Wainwright, ___ U.S. ___, 105 S.Ct. 355 (1985), (Marshall and Brennan, JJ, dissenting from denial of cert.). Where, as here,

however, the accused is acting as his own counsel and has, as the trial court in this case directly and frequently pointed out, full responsibility for making tactical and strategic decisions during trial, it is the accused who must be able to consult with the witnesses. The procedural rights afforded by the Constitution are personal to the accused, Faretta v. California, 422 U.S. 806, 819 (1975), and where the accused chooses to represent himself, it is all the more necessary that he personally exercise those rights. Standby counsel, as this Court has made clear, has a very limited role to play. McKaskle v. Wiggins, 465 U.S. 168 (1984). Standby counsel is not obliged to perform, nor can the defendant be forced to give up, the roles of investigator, strategist and decision-maker.

In Faretta, this Court plainly noted that the right to defend is personal, and that the allocation of strategy decisions to counsel is justified in any given case only by the accused's consent at the outset to accept counsel as his strategist and decision-maker. Id at 820.

Subsequently, in McKaskle v. Wiggins, the Court elaborated on this notion. There it was pointed out that the core of the Faretta right is the entitlement "to preserve actual control." Id 79 L.Ed.2d at 133.

> A defendant's right to self representation plainly encompasses certain specific rights to have his voice heard. The pro se defendant must be allowed to control the organization and content of his own defense, to make motions, to argue points of law, to participate in voir dire, to question witnesses, and to address the court and the jury at appropriate points in the trial.

Id. at 131. (Emphasis added).

The interviewing of witnesses and preparation of those witnesses for trial is an integral part of the trial lawyer's responsibility. See A.B.A. Standards Relating to the Defense Function, § 5.2 (App. Draft 1971).

(lawyer must decide which witnesses to call and whether and how they should be examined.) See also State v. Renshaw, 276 Md. 259, 347 A.2d 219 (1975). Because it is an essential part of the lawyer's duty, it is likewise essential that the lawyer be given the opportunity to perform that duty. Pro se litigants must be afforded the same opportunity in the absence of some compelling overriding justification.

The courts that have addressed the issue of the extent of the right to prepare a defense in the context of right to counsel cases have generally recognized that limitations on the manner in which pretrial investigations are conducted may be justifiable in some circumstances. Security has been considered a valid reason for reasonable restrictions on access to witnesses. See State v. Lerner, and other cases cited, supra at p.14.

Several factors remove this case from the class of cases restricting access to witnesses, however. The trial judge in this case explicitly denied that security was the concern motivating his decision.[10] Moreover, the record does not in fact

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[10] In the course of the discussion, Petitioner's standby counsel stated:

> "Mr. Grandison respectfully requests an opportunity to discuss with Mr. Kelly in person certain aspects of Mr. Kelly's possible testimony. It is my understanding from the Court that this was denied for I believe security reasons

(cont.)

support a finding that security interests could not be accommodated. Both Petitioner and his witness were in custody; a substantial number of well armed law enforcement officers were present, a fact attested to by the trial judge and the press; Petitioner had never been disruptive or shown any propensity to flee. He had, in addition, been conducting interviews throughout the course of the proceedings at the court house.

Decisions rendered by this Court make it clear that the right to self representation is not to be treated lightly. Unlike the situation in McKaskle,[11] the standby counsel's participation as envisioned by the trial court was not merely mechanical. The interviewing and preparation of witnesses is not a routine procedural or evidentiary matter, and the allocation of these tasks to an assistant whom the trial court referred to as

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10(cont.)

"THE COURT: No, sir, that is not the only reason."

The court had previously provided this explanation for its ruling:

> Now we are coming to the problem. Mr. Kelly is serving life plus 50 years for a crime in which it is alleged that you were involved. Now, I am not going to let the two of you get together and carry on any conversation. If you want to do it through your standby attorney, Mr. Crawford, you may do it, but I am not going to let the two of you, who are alleged to have been involved in a double murder, get together and discuss matters.
>
> There is no point in arguing it. That is it. In addition to serving life plus 50 years, he is facing, I understand, another murder. Now, I am not going to give you and this man an opportunity to get together.

11 McKaskle was a case which, this Court noted, is "not a model for future trials." 79 L.Ed.2d. at 138.

"just kind of a law clerk" was not necessary to ensure compliance with protocol or procedure. Nor was the denial of access to the witness, as the Court of Appeals asserted, a mere "condition" on the interview. 506 A.2d at 608. It was, rather, a direct interference with Petitioner's right to represent himself by allocating to a third party tasks that are at the core of a trial advocate's duties.

If pro se litigants do in fact have the right to plan their defense strategies and to make the decisions which affect their cases, they must be provided with reasonable opportunities to do so. A "condition" which reallocates to counsel the most important tasks involved in preparing and presenting a case renders the right of self representation illusory. This case thus presents circumstances sharply contrasting with those of standby counsel's overreaching in McKaskle.

The distinction between situations where the pro se defendant's conduct of the case is interfered with by standby counsel without prejudice to the ultimate presentation of the case, and those where the opportunity to perform essential duties of an advocate is absolutely denied by the court could be drawn and fully explicated in this case.

III. THE MARYLAND DEATH PENALTY STATUTE AS CONSTRUED AND APPLIED IN PETITIONER'S CASE, VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Maryland capital sentencing statute, Md. Code (1957, 1982 Repl. Vol.), Art. 27, §§412-415, was enacted in 1978. Under the statute, the sentencing authority must first determine

whether one or more statutorily prescribed circumstances exist beyond a reasonable doubt. If none are found, the sentence shall be life imprisonment. §413(f). If one or more aggravating circumstances are found, the sentencing authority must then determine whether any mitigating circumstances exist by a preponderance of the evidence. §413(g). If both aggravating and mitigating circumstances are found, the sentencing authority must weigh the circumstances against each other. As for the balancing process, the statute provides:

> "Weighing mitigating and aggravating circumstances. - (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.
>
> (2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.
>
> (3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life." §413(h).

Pursuant to §413(l) of the statute, the Maryland Court of Appeals adopted rules of procedure to govern sentencing proceedings, including a standard form verdict sheet. Md. Rule 4-343.[12] If the balancing process is reached, the verdict sheet requires the sentencing authority to respond "Yes" or "No" to the statement:

> "Based on the evidence, we unanimously find that it has been proven by a PREPONDERANCE OF THE EVIDENCE that

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[12] At the time Petitioner was sentenced, former Maryland Rule 772A was in force. No change material to this case exists between Rule 772A and Rule 4-343, and the language quoted in this Petition is identical. Thus, references will be made to the current rule.

> the mitigating circumstances marked "yes" in section II outweigh the aggravating circumstances marked "yes" in section I."

If the section is "completed and marked 'no.' enter 'Death'" Id.

Tichnell v. State, 287 Md. 695, 415 A.2d 830 (1980), was the first capital case under the new statute to reach the Maryland Court of Appeals. The Court reversed the sentence on the basis of a prejudicial remark by the trial judge. Id. at 743-45. Nevertheless, the Court addressed, in dicta, various aspects of the new statute including its burdens of proof. Noting that the statute does not expressly allocate the burdens of proof among the parties, the Court explained that, as a practical matter, "the State bears both the risk of nonproduction and nonpersuasion" with respect to proving the existence of aggravating circumstances while "the accused [bears] the risk of nonproduction and nonpersuasion" with respect to proving mitigating circumstances. The Court concluded:

> Finally, if the sentencing authority finds, by a preponderance of the evidence, that the mitigating circumstances do not outweigh the aggravating circumstances, the death penalty must be imposed. §413(h)H2). Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors. Id. at 730.

The conclusion that the State bears the risk of nonpersuasion with respect to proving that aggravating circumstances outweigh mitigating circumstances was puzzling in several respects. First, it appears to conflict with the plain language of both the statute and the court rule. See Stebbing v. Maryland, 105 S.Ct. 276, 280-281, n.6 (1984) (Marshall, J.,

dissenting from denial of cert.); Evans v. State, 304 Md. 487, 542-43, 499 A.2d 1261 (1985) (McAuliffe, J., dissenting). It also conflicts with the interpretation of the Maryland statute by the Chief Legislative Officer in the only piece of legislative history to accompany the statue, T.J. Peddicord, Memorandum to the General Assembly on Capital Punishment--Senate Bill 374 and House Bill 604 (Dec. 14, 1977). The Peddicord Memorandum provides:

> Subsection (H) of §413 requires the court or jury to weigh the aggravating and mitigating factors, assuming that some mitigation has been found to exist. If it finds that mitigation does not outweigh aggravation, the sentence shall be death. (H)(2). If it finds that mitigation does outweigh aggravation, the sentence shall be life imprisonment. (H)(3). Id. at 36.

Finally, the use of the preponderance of the evidence standard in the balancing process strongly suggest that the legislature intended to impose the risk of nonpersuasion on the defendant. See generally, Patterson v. New York, 432 U.S. 197 (1977); Mullaney v. Wilbur, 421 U.S. 684 (1975).

In Johnson v. State, 292 Md. 405, 439 A.2d 542 (1982), in which the proper interpretation of statute regarding burden of proof was directly addressed, the Court of Appeals, quoting from Tichnell, held that "'If the mitigating circumstances do not outweigh the aggravating circumstances by a preponderance of the evidence, ... then a sentence of death must be imposed.'" Id., 292 Md. at 438. See also id., at 440.

The decisions of the Court of Appeals following Johnson confirmed the court's position in Johnson that the defendant bears the ultimate burden of persuasion under §413(h). See

Thomas v. State, 301 Md. 294, 483 A.2d 6 (1984); Stebbing v. State, 299 Md. 331, 473 A.2d 903 (1984); And see Johnson v. State, 303 Md. 487, 537, 495 A.2d 1 (1985); Marziarz v. State, 302 Md. 1, 6, 485 A.2d 245 (1984); Colvin v. State, 299 Md. 88, 122, 472 A.2d 953 (1984); But see Trimble v. State, 300 Md. 387, 415, n. 16, 478 A.2d 1143 (1984).

It was this interpretation that was in force at the time of Petitioner's sentencing and which Petitioner challenged in his Motion to Strike the Notice of Intention to Seek the Sentence of Death. In instructing the jury, the trial judge tracked the language of the statute that on its face places the burden of persuasion on the defendant.

Subsequent to Petitioner's sentencing, but prior to the conclusion of his appeal, the Court of Appeals decided Foster v. State, 304 Md. 439, 499 A.2d 1236 (1985). In that case, the Court reverted to its earlier position that the Maryland statute does not place any burden of persuasion on the defendant. Id., 304 Md. 15 476-77. The Court of Appeals relied on its holding in Foster in concluding in Petitioner's case that the statute was not unconstitutional. 406 A.2d at 622-23.

Although it generally is the province of the state courts to "interpret, and where they see fit, to reinterpret" their own constitutions and statutes, Gardner v. Louisiana, 368 U.S. 157, 169 (1961), limitations are imposed on judicial reconstruction by the due process clause. A court may not use its interpretive authority as an "'obvious subterfuge to evade consideration of a federal issue.'" Mullaney v. Wilbur, 421 U.S. at 696, n.11. The

decision in the instant case is "an obvious attempt to avoid the constitutional implications of forcing a defendant to shoulder the burden of persuading the sentencing authority that he should not be put to death." See Evans v. State, 304 Md. at 545 (McAuliffe, J., dissenting).

Assuming that Petitioner's constitutional attack was meritorious, the Court's strained construction on appeal does not eliminate the unconstitutionality of Petitioner's sentence. "[W]here an accused is tried under a broad construction of an Act which would make it unconstitutional, the conviction cannot be sustained an appeal by a limiting construction which eliminates the unsconstitutional features of Act ...." Ashton v. Kentucky, 384 U.S. 195, 198 (1966). The same principle applies to sentencing statutes. See Hicks v. Oklahoma, 447 U.S. 343, 346-47 (1980).

Reconstruction may render a criminal statute unduly vague with respect to those persons convicted prior to the reconstruction.

> If the Fourteenth Amendment is violated when a person is required "to speculate as to the meaning of penal statutes," ...or to "guess at the statute's meaning and differ as to its application," ...the violation is that much greater when, because the uncertainty as to the statute's meaning is itself not revealed until the court's decision, a person is not even afforded an opportunity to engage in such speculation before committing the act in question. Bouie v. City of Columbia, 378 U.S. 347, 352 (1964).

The Maryland capital sentencing statute plainly failed to apprise "trial judges, jurors and attorneys throughout th[e] State" of the standard of proof to be applied. Evans v. State, 304 Md. at 542 (McAuliffe, J., dissenting). See also Stebbing v. Maryland,

supra, 105 S.Ct. at 280 n.11 ("The jury or court is left on its own to guess at the burden of proof on the ultimate question.") (Marshall, J., dissenting from denial of cert.). Although the vagueness "might be cured for the future by [the] authoritative judicial gloss," of the Court of Appeals, it is not cured as to Petitioner whose sentence was imposed without adequate guidance. Bouie v. City of Columbia, 378 U.S. at 353.

Even if the Maryland statute, as the Court of Appeals has now construed it, does not place the ultimate burden of proof on the accused, the fact remains that the law was not so construed at the time of Petitioner's sentencing. Moreover, twenty persons in addition to Petitioner have been sentenced to die in Maryland without the benefit of the Foster reconstruction. At least seven other states, by statute to prove that mitigating circumstances outweigh aggravating circumstances.[13] The question whether the State may require a criminal defendant to prove the ultimate impropriety of the death sentence is one that has never been addressed by this Court. It affects many defendants in several states and warrants this Court's review.

The Maryland statute, like statutes in several states, does not require proof beyond a reasonable doubt that the aggravating

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[13] The seven states are: Arizona, see Ariz. Rev. Stat. Ann. § 13-703(E) (1978) (construed in State v. Watson, 120 Ariz. 441, 586 P.2d 1253, 1258-59 (1978), cert. denied, 440 U.S. 924 (1979)); Colorado, see Colo. Rev. Stat. Ann. § 16-11-103(2)(a)(II) (Supp. 1985); Missouri, see Mo. Ann. Stat. § 565.030.4(3) § 46-18-305 (1985); Nevada, see Nev. Rev. Stat. § 200.030.4(a) (1985); Oklahoma, see 21 Okla. Stat. Ann. § 701.11 (1983); and Wyoming, Wyo. Stat. § 6-2-102(d)(i)(B) (1983).

circumstances outweigh the mitigating circumstances.[14] This issue, which has never been addressed directly by this Court, is the source of disagreement and confusion in the lower courts. See, e.g., Ford v. Strickland, 696 F.2d 804, 817-19 (11th Cir.), cert. denied, 464 U.S. 865 (1983); id. at 877-883 (Anderson & Clark, JJ., dissenting); Evans v. State, 304 Md. at 550-553 (McAuliffe, J., dissenting); Tichnell v. State, 287 Md. at 732-34; See generally Smith v. North Carolina, 459 U.S. 1056 (1982) (Stevens, J., respecting the denial of cert.); State v. Wood, 648 P.2d at 80-85; Comment, "Capital Punishment and the Burden of Proof: The Sentencing Decision," 17 Cal. W.L. Rev. 316 (1981).

Review by this Court is thus warranted to resolve the

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[14] Among the states in which the death penalty staute has been authoritatively construed not to require proof beyond a reasonable doubt are: California, see People v. Frierson, 25 Cal.3d 142, 158 Cal. Rep. 281, 599 P.2d 587, 609-610 (1979); Idaho, see State v. Sivak, 105 Idaho 900, 647 P.2d 396, 401 (1983), cert. denied, 104 S.Ct. 3591 (1984); Illinois, see People v. Garcia, 97 Ill.2d 58, 454 N.E.2d 274, 282-83, 73 Ill. Dec. 414 (1983), cert. denied, 104 S.Ct. 3555 (1984); Missouri, see State v. Boulder, 635 S.W.2d 673, 684 (Mo. 1982), cert. denied, 459 U.S. 1137 (1983); New Mexico, see State v. Finnell 101 N.M. 732, 688 P.2d 769, 772-773 (1984); and Pennsylvania, see Commonwealth v. Zettlemoyer, 500 Pa. 16, 454 A.2d 937, 963 (1982), cert. denied, 461 U.S. 970 (1983).

At least six states require proof beyond a reasonable doubt that aggravating circumstances outweigh mitigating circumstances. These states are: Arkansas, see Ark. Stat. Ann. § 41-1302(b) (1977 Repl. Vol.): Massachusetts, see Mass. Gen. Laws Ann. ch. 279, § 68 (Supp. 1985); North Carolina, see State v. McDougall, supra, 301 S.E.2d at 327; Ohio, see Ohio Rev. Stat. Ann. § 2929.03(D)(1) (1982); Utah, see State v. Wood, supra, 648 P.2d at 83-84; and Washington, see Wash. Rev. Code Ann. § 10.95.060(4) (Supp. 1986). In addition, Texas and Virginia do not use a balancing aplproach but require proof of all circumstances beyond a reasonable doubt. See Tex. Code Crim. Pro. art. 37.071(c) (Supp. 1986); Va. Code § 9.2-264.4 (1983 Repl. Vol.).

important Eighth and Fourteenth Amendment issues concerning the allocation and standard of proof in capital sentencing cases.

IV. RULINGS AND INSTRUCTIONS BY THE TRIAL COURT WHICH DEPRIVE THE JURY IN A CAPITAL CASE OF THE POWER TO SHOW COMPASSION OR EXTEND MERCY TO THE ACCUSED VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Throughout the proceedings in this case, the trial court took the position that if the jury failed to find that mitigating factors outweighed any aggravating factors it was required by law to impose the death sentence. The court's and prosecutor's questions on voir dire created the erroneous impression that the jury could be required to impose the death penalty; and that erroneous impression was confirmed by the court's instructions and refusal to give those requested by Petitioner. Petitioner repeatedly and strenuously argued that it was within the jury's discretion to impose a life sentence notwithstanding an inability to justify its decision under the confines of the death penalty statute's aggravating/mitigating circumstances analysis.

To the extent that limitations are placed on the jury's exercise of discretion in capital cases, those limits are imposed by virtue of consititutional parameters under the Eighth Amendment. It is to ensure that the death penalty is imposed in a consistent, rational manner that this Court has "attempted to provide standards for a constitutitonal death penalty that would serve both goals of measured, consistent application and fairness to the accused." Eddings v. Oklahoma, 455 U.S. 104, 111. (1982). Although it appears that there is some present

disagreement among members of this Court as to whether the jury has the ultimate power to reject the sentence of death after a full statutory analysis leads to the opposite conclusion, compare Smith v. North Carolina, 459 U.S. 1056 (1982) (Stevens, J., in re denial of cert.) with Brown v. California, 39 Crim. L. Rptr. 4004 (Mar. 27, 1986). (Rehnquist, J. in re stay of proceedings), it has never been held that a rational imposition of the death penalty requires concomitant rational imposition of a life sentence in its stead. Indeed, a plurality of the Court explicitly rejected that argument in Gregg v. Georgia, 423 U.S. 153, 199 (1976), stating ". . . nothing in any of our cases suggests that the decision to afford an individual defendant mercy violates the Constitution."

The power of the jury to show compassion or extend mercy has particular significance in Maryland. The practice of permitting the jury to add a recommendation of mercy to its verdict is "of great antiquity." LaGuardia v. State, 190 Md. 450, 58 A.2d 913 (1948). Under previous laws in Maryland, only the court could sentence a convicted murderer to the death penalty; nevertheless, the legislature gave the jury that heard the case the right to attach to its verdict the words "without capital punishment." Laws 1916, Chap. 214, codified in Code 1957, Art. 27, §413 (1967 Repl. Vol.). The Rules of Procedure echo this longstanding Maryland policy of allowing the jury to show mercy by providing that "A jury may attach to its verdict a recommendation to the court to show mercy to the defendant ..." Md. Rule 4-327(e).

There is no reason in principle why the concept of

sentencing applicable in non-capital cases should not apply in a death penalty proceeding. Indeed, it is difficult to conceive of a justification for allowing a court or jury to show compassion when an individual faces a maximum one year sentence for possession of marijuana, but not allowing compassion to play a part in determining whether a person should be executed. This Court has noted, in fact, that ". . . it is preferable not to impose restrictions." Zant v. Stephens, 462 U.S. 862 (1983).

Nothing in the Maryland statutes or in decisions of this Court prohibit the exercise of discretion to show compassion or extend mercy. Indeed, some concern has been expressed that a recognition of the jury's power to grant mercy might result in "unleashed" discretion. Lockett v. Ohio, 438 U.S. 586, 622-23, 629-31 (1978) (White and Rehnquist, JJ, concurring in part, dissenting in part).

The fear of a return to unbridled discretion, a concern which was articulated by the Court of Appeals in this case, 406 A.2d at 616 is, however, unwarranted. Unlike the potential arbitrariness problems identified in Woodson v. North Carolina, 420 U.S. 280, 303-305 (1978), there is no reason to believe that a jury given the opportunity to extend mercy would render an unreliable verdict as to either guilt/innocence or sentence. The danger that a jury would render an acquittal not because of a failure of proof, but upon the belief that the only available sentence - death - is inappropriate, is in fact decreased where the jury is advised of its broad role in determining the appropriateness of the death sentence.

A recommendation of mercy represents a kind of aggregate jury determination based on the jury's review of the totality of aggravating and mitigating circumstances. Thus, contrary to the assertion that a recommendation of this sort represents unbridled jury discretion, it represents the essential overarching perspective of the jury based on the totality of evidence offered during the sentencing hearing. As the "link between contemporary community values and the penal system," Gregg 428 U.S. at 181, the jury alone is fit to make this judgment.

Most important of all, the recommendation of mercy by a Maryland jury would increase the reliability of the jury's decision, and so advance the Court's concern for rationally differentiating between those deserving the death penalty and all others. In Caldwell v. Mississippi, ____ U.S. ____, 105 S.Ct. 2633 (1985), this Court overturned an imposition of death when it determined that the jury might have relied on a state prosecutor's suggestion that the State Supreme Court, as reviewing authority, and not the jury, was the true determiner of whether the defendant would die. No reviewing court, the majority noted, was an adequate substitute for the jury's judgment. Id. at 4746. Caldwell suggests that jury reliability is a byproduct of the jury's understanding of its duties and obligations. The power to recommend mercy would, if anything, increase the jury's sense of responsibility for its own role as decisionmaker. The jury's choice of foregoing a mercy recommendation should carry the presumption that after weighing the totality of mitigating and aggravating circumstances, the

jury consciously has decided that capital punishment is appropriate and fair. Such a discretionary right conforms to constitutional requirements and can only enhance the reliability of the process leading to ultimate judgment.

Given the importance of this issue, the concern expressed by members of the Court about the propriety of the jury being either granted or denied the power to extend mercy, and the attendant confusion over the constitutionality of practices and procedures that follow one line of reason over another, it is in the public interest to resolve the issue. This case presents an appropriate vehicle for addressing the issue. The question was clearly presented to the trial court in two contexts - during voir dire and during the sentencing instructions stage. The trial court took a definite position on the issue, ruling that the jury did not have the discretion to extend mercy. The Court of Appeals, adopting the trial court's reasoning, has set a clear precedent on the issue, finding:

> To have instructed the jury as Grandison requested would have negated the carefully thought out sentencing procedure designed to meet the constitutional requirements set forth by the Supreme Court by injecting the risk of arbitrary and capricious action into the proceeding ... In certain circumstances, the imposition of the death sentence is the only legally possible outcome under the statute. 406 A.2d at 616.

Accordingly, Petitioner respectfully requests that this Honorable Court grant his petition for a writ of certiorari .

Respectfully submitted,

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EDITOR'S NOTE

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NO. 85-7165

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ANTHONY GRANDISON, SR.

Petitioner

v.

STATE OF MARYLAND,

Respondent

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

APPENDIX

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Counsel for Petitioner

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution, Amendment VIII:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

United States Constitution, Amendment XIV:

> . . .(N)or shall any state deprive any person of life, liberty, or property, without due process of law, nor deny to any person within the jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS INVOLVED

Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 412:

> § 412. Punishment for murder.
>
> (a) Designation of degree for court or jury. -- If a person is found guilty of murder, the court of jury that determined the person's guilt shall state in the verdict whether the person is guilty of murder in the first degree or murder in the second degree.

(b) Penalty for first degree murder. -- A person found guilty of murder in the first degree shall be sentenced either to death or to imprisonment for life. The sentence shall be imprisonment for life unless (1) the State notified the person in writing at least 30 days prior to trial that it intended to seek a sentence of death, and advised the person of each aggravating circumstance upon which it intended to rely, and (2) a sentence of death is imposed in accordance with § 413.

(c) Penalty for second degree murder. -- A person found guilty of murder in the second degree shall be sentenced to imprisonment for not more than 30 years.

Maryland Code (1957, 1982 Repl. Vol.) Art. 27, Sec. 413:

§ 413. Sentencing procedure upon finding of guilty of first degree murder.

(a) Separate sentencing proceeding required. -- If a person is found guilty of murder in the first degree, and if the State had given the notice required under Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial has been completed to determine whether he shall be sentenced to death or imprisonment for life.

(b) Before whom proceeding conducted. -- This proceeding shall be conducted:

(1) Before the jury that determined the defendant's guilt; or

(2) Before a jury impaneled for the purpose of the proceeding if:

(i) The defendant was convicted upon a plea of guilty;

(ii) The defendant was convicted after a trial before the court sitting without a jury;

(iii) The jury that determined the defendant's guilt has been discharged by the court for good cause; or

(iv) Review of the original sentence of death by a court of competent jurisdiction has resulted in a remand for resentencing; or

(3) Before the court alone, if a jury sentencing proceeding is waived by the defendant.

(c) Evidence; argument; instructions.

-- (1) The following type of evidence is admissible in this proceeding:

(i) Evidence relating to any mitigating circumstance listed in subsection (g) of this section;

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of this section of which the State had notified the defendant pursuant to Section 412(b);

(iii) Evidence of any prior criminal convictions, pleas of guilty or nolo contendere, or the absence of such prior convictions or pleas, to the same extent admissible in other sentencing procedures;

(iv) Any presentence investigation report. However, any recommendation as to sentence contained in the report is not admissible; and

(v) Any other evidence that the court deems of probative value and relevant to sentence, provided the defendant is accorded a fair opportunity to rebut any statements.

(2) The State and the defendant or his counsel may present argument for or against the sentence of death.

(3) After presentation of the evidence in a proceeding before a jury, in addition to any other appropriate instructions permitted by law, the court shall instruct the jury as to the findings it must make in order to determine whether the sentence shall be death or imprisonment for life and the burden of proof applicable to these findings in accordance with subsection (f) or subsection (h) of this section.

(d) Consideration of aggravating circumstances -- In determining the sentence, the court or jury, as the case may be, shall first consider whether, beyond a reasonable doubt, any of the following aggravating circumstances exist:

(1) The victim was a law enforcement officer who was murdered while in the performance of his duties.

(2) The defendant committed the murder at a time when he was confined in any correctional institution.

(3) The defendant committed the murder in furtherance of an escape or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

(4) The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

(5) The victim was a child abducted in violation of § 2 of this article.

(6) The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

(7) The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

(8) At the time of the murder, the defendant was under sentence of death or imprisonment for life.

(9) The defendant committed more than one offense of murder in the first degree arising out of the same incident.

(10) The defendant committed the murder while committing or attempting to commit robbery, arson, rape, or sexual offense in the first degree.

(e) Definition. -- As used in this section, the following terms have the meanings indicated unless a contrary meaning is clearly intended from the context in which the term appears:

(1) The terms "defendant" and "person", except as those terms appear in subsection (d) (7), include only a principal in the first degree.

(2) The term "correctional institution" includes any institution for the detention or confinement of persons charged with or convicted of a crime, including Patuxent Institution, any institution for the detention or confinement of juveniles charged with or adjudicated as being delinquent, and any hospital in which the person was confined pursuant to an order of a court exercising criminal jurisdiction.

(3) The term "law enforcement officer" has the meaning given in § 727 of Article 27. However, as used in subsection (d), the term also includes (i) an officer serving in a probationary status, (ii) a parole and probation officer, and (iii) a law enforcement officer of a jurisdiction outside of Maryland.

(f) Finding that no aggravating circumstances

exist. -- If the court or jury does not find, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall state that conclusion in writing, and the sentence shall be imprisonment for life.

(g) Consideration of mitigating circumstances. -- If the court or jury finds, beyond a reasonable doubt, that one or more of these aggravating circumstances exist, it shall then consider whether, based upon a preponderance of the evidence, any of the following mitigating circumstances exist:

(1) The defendant has not previously (i) found guilty of a crime of violence, (ii) entered a plea of guilty or nolo contendere to a charge of a crime of violence; or (iii) had a judgment of probation on stay of entry of judgment entered on a charge of a crime of violence. As used in this paragraph, "crime of violence" means abduction, arson, escape, kidnapping, manslaughter, except involuntary manslaughter, mayhem, murder, robbery, or rape or sexual offense in the first or second degree, or an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

(2) The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

(3) The defendant acted under substantial duress, domination or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

(4) The murder was committed while the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder, emotional disturbance, or intoxication.

(5) The youthful age of the defendant at the time of the crime.

(6) The act of the defendant was not the sole proximate cause of the victim's death.

(7) It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

(8) Any other facts which the jury or the court specifically sets forth in writing that it finds as

mitigating circumstances in the case.

(h) Weighing mitigating and aggravating circumstances. -- (1) If the court or jury finds that one or more of these mitigating circumstances exist, it shall determine whether, by a preponderance of the evidence, the mitigating circumstances outweigh the aggravating circumstances.

(2) If it finds that the mitigating circumstances do not outweigh the aggravating circumstances, the sentence shall be death.

(3) If it finds that the mitigating circumstances outweigh the aggravating circumstances, the sentence shall be imprisonment for life.

(i) Determination to be written and unanimous. -- The determination of the court or jury shall be in writing, and, if a jury, shall be unanimous and shall be signed by the foreman.

(j) Statements required in determination. -- The determination of the court or jury shall state, specifically:

(1) Which, if any, aggravating circumstances it finds to exist;

(2) Which, if any, mitigating circumstances it finds to exist;

(3) Whether any mitigating circumstances found under subsection (g) outweigh the aggravating circumstances found under subsection (d);

(4) Whether the aggravating circumstances found under subsection (d) are not outweighed by mitigating circumstances found under subsection (g); and

(5) The sentence, determined in accordance with subsection (f) or (h).

(k) Imposition of sentence. -- (1) The court shall impose the sentence determined by the jury under subsection (f) or (h).

(2) If the jury, within a reasonable time is not able to agree as to sentence, the court shall dismiss the jury and impose a sentence of imprisonment for life.

(3) If the sentencing proceeding is conducted before a court without a jury, the court shall impose the sentence determined under subsection (f) or (h).

(l) Rules of procedure. -- The Court of Appeals may adopt rules of procedure to govern the conduct of a sentencing proceeding conducted pursuant to this section, including any forms to be used by the court or jury in making its written findings and determinations of sentence.

(m) Alternate jurors. -- (1) A judge shall appoint at least 2 alternate jurors when impaneling a jury for any proceeding:

(i) In which the defendant is being tried for a crime for which the death penalty may be imposed; or

(ii) Which is held under the provisions of this section.

(2) The alternate jurors shall be retained during the length of the proceedings under such restrictions and regulations as the judge may impose.

(3) (i) If any juror dies, becomes incapacitated, or disqualified, or is discharged for any other reason before the jury begins its deliberations on sentencing, an alternate juror becomes a juror in the order in which selected, and serves in all respects as those selected on the regular trial panel.

(ii) An alternate juror may not replace a juror who is discharged during the actual deliberations of the jury on the guilt or innocence of the defendant, or on the issue of sentencing.

Maryland Code (1957, 1982 Repl. Vol.), Art. 27, § 414:

§ 414. Automatic review of death sentences.

(a) Review by Court of Appeals required. -- Whenever the death penalty is imposed, and the judgment becomes final, the court of Appeals shall review the sentence on the record.

(b) Transmission of papers to Court of Appeals. -- The clerk of the trial court shall transmit to the Clerk of the Court of Appeals the entire record and transcript of the sentencing proceeding within ten days after receipt of the transcript by the trial court. The clerk also shall transmit the written findings and determination of the court or jury and a report prepared by the trial court. The report shall be in the form of a standard questionnaire prepared and supplied by the Court of Appeals of Maryland and shall include a recommendation by the trial court as to whether or not

imposition of the sentence of death is justified in the case.

(c.) Briefs and oral argument. -- Both the State and the defendant may submit briefs and present oral argument within the time provided by the Court.

(d.) Consolidation of appeals. -- Any appeal from the verdict shall be consolidated in the Court of Appeals with the review of sentence.

(e.) Consideration by Court of Appeals. -- In addition to the consideration of any errors properly before the Court on appeal, the Court of Appeals shall consider the imposition of the death sentence. With regard to the sentence, the Court shall determine:

(1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor;

(2) Whether the evidence supports the jury's or court's findings of a statutory aggravating circumstance under § 413 (d);

(3) Whether the evidence supports the jury's or court's finding that the aggravating circumstances are not outweighed by mitigating circumstances; and

(4) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

(f) Decision of Court of Appeals. -- (1) In addition to its review pursuant to any direct appeal, with regard to the death sentence, the Court shall:
(i) Affirm the sentence;
(ii) Set aside the sentence and remand the case for the conduct of a new sentencing proceeding under § 413; or
(iii) Set aside the sentence and remand for modification of the sentence to imprisonment for life.

(2) The court shall include in its decision a reference to the similar cases which it considered.

(g) Rules of procedure. -- The Court may adopt rules of procedure to provide for the expedited review of all death sentences pursuant to this section.

RULES INVOLVED

Maryland Rule 4-343:

Rule 4-343. SENTENCING -- PROCEDURE IN CAPITAL CASES

(a) **Applicability.** -- This Rule applies whenever sentence is imposed under Code, Article 27, Sec. 413.

(b) **Statutory Sentencing Procedure.** -- When a defendant has been found guilty of murder in the first degree and the State has given the notice required under Code, Article 27, Sec. 412(b), a separate sentencing proceeding shall be conducted as soon as practicable after the trial pursuant to the provisions of the Code, Article 27, § 413.

(c) **Judge.** -- Except as provided in Rule 4-361, the judge who presides at trial shall preside at the sentencing proceeding.

(d) **Allocution.** -- Before sentence is determined, the court shall afford the defendant the opportunity, personally and through counsel, to make a statement.

(e) **Written Findings and Determinations.** -- The findings and determinations shall be made in writing in the following form:

(CAPTION)

FINDINGS AND SENTENCING DETERMINATION

Section I

Based upon the evidence, we unanimously find that each of the following aggravating circumstances that is marked "yes" has been proven BEYOND A REASONABLE DOUBT. Each of the aggravating circumstances that has not been so proven is marked "no."

1. The victim was a law enforcement officer who was murdered while in the performance of the officer's duties.

Yes No

2. The defendant committed the murder at a time when confined in a correctional institution.

Yes No

3. The defendant committed the murder in furtherance of an escape from or an attempt to escape from or evade the lawful custody, arrest, or detention of or by an officer or guard of a correctional institution or by a law enforcement officer.

Yes No

4. The victim was taken or attempted to be taken in the course of a kidnapping or abduction or an attempt to kidnap or abduct.

Yes No

5. The victim was a child abducted in violation of Code, Article 27, Sec.2.

Yes No

6. The defendant committed the murder pursuant to an agreement or contract for remuneration or the promise of remuneration to commit the murder.

Yes No

7. The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

Yes No

8. At the time of the murder, the defendant was under the sentence of death or imprisonment for life.

Yes No

9. The defendant committed more than one offense of murder in the first degree arising out of the same incident.

Yes No

10. The defendant committed the murder while committing or attempting to commit robbery, arson, rape

in the first degree or sexual offense in the first degree.

Yes No

(If one or more of the above are marked "yes," complete Section II. If all of the above are marked "no," do not complete Sections II and III.)

Section II

Based upon the evidence, we unanimously find that each of the following mitigating circumstances that is marked "yes" has been proven to exist by A PREPONDERANCE OF THE EVIDENCE. Each mitigating circumstance that has not been so proved is marked "no."

1. As used in this paragraph, "crime of violence" means abductions, arson, escape, kidnapping, mayhem, murder, robbery, rape in the first or second degree, sexual offense in the first or second degree, manslaughter other than involuntary manslaughter, an attempt to commit any of these offenses, or the use of a handgun in the commission of a felony or another crime of violence.

The defendant previously (i) has not been found guilty of a crime of violence; and (ii) has not entered a plea of guilty or nolo contendere to a charge of a crime of violence; and (iii) has not been granted probation on stay of entry of judgment pursuant to a charge of a crime of violence.

Yes No

2. The victim was a participant in the defendant's conduct or consented to the act which caused the victim's death.

Yes No

3. The defendant acted under substantial duress, domination, or provocation of another person, but not so substantial as to constitute a complete defense to the prosecution.

Yes No

4. The murder was committed while the capacity of the defendant to appreciate the criminality of his

conduct or to conform his c nduct to the requirements of law was substantitally impaired as a result of mental incapacity, mental disorder, or emotional disturbance.

Yes No

5. The defendant was of a youthful age at the time of the crime.

Yes No

6. The act of the defendant was not the sole proximate cause of the victim's death.

Yes No

7. It is unlikely that the defendant will engage in further criminal activity that would constitute a continuing threat to society.

Yes No

8. Other facts specifically set forth below constitute mitigating circumstances:

Yes No

_____

_____

_____

_____

(Use reverse side if necessary)

(If one or more of the above in Section II have been marked "yes," complete Section III. If all of the above in Section II are marked "no," do not complete Section III.)

Section III

Based on the evidence, we unanimously find that it has been proven by A PREPONDERANCE OF THE EVIDENCE that the mitigating circumstances marked "yes" in Section II outweigh the aggravating circumstances marked "yes" in Section I.

DETERMINATION OF SENTENCE

Enter the determination of sentence either "Life Imprisonment" or "Death" according to the following instructions:

1. If all of the answers in Section I are marked "no," enter "Life Imprisonment."

2. If Section III was completed and was marked "yes" enter "Life Imprisonment."

3. If Section II was completed and all of the answers were marked "no" then enter "Death."

4. If Section III was completed and was marked "no" enter "Death."

We unanimously determine the sentence to be _____.

_____ Foreman	_____ Juror 7
_____ Juror 2	_____ Juror 8
_____ Juror 3	_____ Juror 9
_____ Juror 4	_____ Juror 10
_____ Juror 5	_____ Juror 11
_____ Juror 6	_____ Juror 12

or, _____ JUDGE

(f) **Advice of the Judge.** -- At the time of imposing sentence, the judge shall advise the defendant of the right of appeal and the time allowed for the exercise of this right. The judge shall also advise a defendant who receives a sentence of death that (1) the sentence only will be reviewed automatically by the Court of Appeals, and (2) the sentence will be stayed pending a review of the sentence by the Court of Appeals and any appeal which the defendant may take.

(g) **Report of Judge.** -- After sentence is imposed, the judge promptly shall prepare and send to the parties a report in the following form:

(CAPTION)

REPORT OF TRIAL JUDGE

I. Data Concerning Defendant
A. Date of Birth

B. Sex
C. Race
D. Address
E. Length of Time in Community
F. Reputation in Community
G. Family Situation and Background
1. Situation at time of offense (describe defendant's living situation including marital status and number and age of children)
2. Family history (describe family history including pertinent data about parents and siblings)
H. Education
I. Work Record
J. Prior Criminal Record and Institutional History (list any prior convictions, disposition, and periods of incarceration)
K. Military History
L. Pertinent Physical or Mental Characteristics or History
M. Other Significant Data About Defendant

II. Data Concerning Offense
A. Briefly describe facts of offense (include time, place, and manner of death; weapon, if any; other participants and nature of participation)
B. Was there any evidence that the defendant was under the influence of alcohol or drugs at the time of the offense? If so, describe.
C. Did the defendant know the victim prior to the offense?
Yes ___ No ___
1. If so, describe relationship
2. Did the prior relationship in any way precipitate the offense? If so, explain.
D. Did the victim's behavior in any way provoke the offense? If so, explain.
E. Data Concerning Victim
1. Name
2. Date of Birth
3. Sex
4. Race
5. Length of time in community
6. Reputation in community
F. Any Other Significant Data About Offense

III. A. Plea Entered By Defendant:
Not guilty___; guilty___; not guilty by reason of insanity ___
B. Mode of Trial:
Court___ Jury___
If there was a jury trial, did defendant challenge the jury selection or composition? If so, explain.
C. Counsel

1. Name
2. Address
3. Appointed or retained (If more than one attorney represented defendant, provide data on each and include stage of proceeding at which the representation was furnished.)

D. Pre-Trial Publicity -- Did defendant request a mistrial or a change of venue on the basis of publicity? If so, explain. Attach copies of any motion made and exhibits filed.

E. Was defendant charged with other offenses arising out of the same incident? If so, list charges; state whether they were tried at same proceeding, and give disposition.

IV. Data Concerning Sentencing Proceeding

A. List aggravating circumstance(s) upon which state relied in the pretrial notice.

B. Was the proceeding conducted before same judge as trial _____ before same jury _____

If the sentencing proceeding was conducted before a jury other than the trial jury, did the defendant challenge the selection or composition of the jury? If so, explain.

C. Counsel -- If counsel at sentencing was different from trial counsel, give information requested in III C above.

D. Which aggravating and mitigating circumstances were raised by the evidence?

E. On which aggravating and mitigating circumstances were the jury instructed?

F. Sentence imposed: Life imprisonment
Death

V. Chronology

Date of Offense
Arrest
Notification of intention to seek penalty of death
Trial (guilt/innocence) -- began and ended
Post-trial Motions Disposed Of
Sentencing Proceeding -- began and ended
Sentence imposed

VI. Recommendation of Trial Court as to Whether Imposition of Sentence of Death is Justified

VII. A copy of the Findings and Sentencing Determination made in this case is attached to and made a part of this report.

_____
JUDGE

CERTIFICATION

I certify that on the _____ day of _____, 19__ I sent copies of this report to counsel for the parties for comment and have attached any comments made by them to this report.

_____
JUDGE

Within five days after receipt of the report, the parties may submit to the judge written comments concerning the factual accuracy of the report. The judge promptly shall file with the clerk of the trial court, and in the case of a life sentence with the Clerk of the Court of Appeals the report in final form, noting any changes made, together with any comments of the parties.

Anthony GRANDISON

v.

STATE of Maryland.

Nos. 65 & 108, Sept. Term, 1984.

Court of Appeals of Maryland.

April 1, 1986.

Defendant was convicted of first-degree murder, conspiracy to commit murder, and use of handgun in commission of crime of violence by the Circuit Court, Somerset County, J. Lloyd Simpkins, J., and he appealed. The Court of Appeals, Couch, J., held that: (1) conspiracy charge was properly venued in county where murders were committed; (2) murder and handgun charges were properly venued in county where murders were committed, though defendant was guilty of murders solely by virtue of having entered into conspiracy in other county; (3) denial of defendant's request for further removal, based on extensive publicity surrounding case, was not abuse of discretion where case had previously been removed from county where murders were committed; (4) refusal to grant defendant's request to individually voir dire members of jury panel was erroneous; (5) admission of photographs of victims was not abuse of discretion; (6) ample independent evidence was presented of existence of conspiracy, so that declarations of coconspirators were admissible as exception to hearsay rule; (7) evidence that defendant had been charged with trafficking in drugs was admissible to show motive for arranging murders; (8) refusal to admit coconspirator's federal grand jury testimony against State was not erroneous; and (9) death penalty was proportionate to sentences imposed in similar cases and authorized by statute.

Affirmed.

1. Criminal Law ⇐112(3)

Defendant, who was charged with conspiracy to murder, was properly prosecuted in county where murder was committed, though alleged acts of conspiracy took place in other county.

2. Criminal Law ⇐145

Defendant, who was charged with conspiracy to murder and murder, waived objection to venue of murder count by failing to object at trial.

3. Conspiracy ⇐41

Conspirator is responsible for logical and natural consequences of acts committed by fellow conspirators, even for homicide committed outside of his presence and which he never contemplated, where acts are done in pursuance of common design or purpose of conspiracy.

4. Criminal Law ⇐59(5)

One who encourages, aids, abets or assists perpetrator in commission of offense is equally culpable with perpetrator, act, and this culpability extends to all proximate, natural and logical consequences of act.

5. Criminal Law ⇐110

Murder count against defendant was properly venued in county where murder occurred, though defendant was at most vicariously liable for crime by virtue of conspiracy entered into outside county.

6. Criminal Law ⇐620(4)

Trial court, in exercising its discretion to decide whether defendant's motion for severance should be granted, must balance likely prejudice to defendant against possible effects on economy and efficiency in judicial administration.

7. Conspiracy ⇐46

Overt acts of conspirators in commission of crime are clearly relevant and material to proof of conspiracy.

8. Criminal Law ⇐620.6

Defendant's bare allegation that he wished to testify on less than all counts charged did not mandate severance where defendant did not indicate nature or importance of testimony.

SERIES

here murder was committed, zed acts of conspiracy took r county.

Law ⇐145
nt, who was charged with con- urder and murder, waived ob- ue of murder count by failing rial

y ⇐41
tor is responsible for logical consequences of acts commit- conspirators, even for homi- d outside of his presence and er contemplated, where acts- ursuance of common design or nspiracy.

Law ⇐59(5)
encourages, aids, abets or trator in commission of of- lly culpable with perpetration ulpability extends to all prox- and logical consequences of

aw ⇐110
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⇐46
s of conspirators in commis- re clearly relevant and mate- f conspiracy.

aw ⇐620.6
s bare allegation that he tify on less than all counts t mandate severance, where not indicate nature or impor- ony.

9. Criminal Law ⇐121

Trial court's order, transferring entire prosecution to other county based on fact that some of counts were punishable by death, was not abuse of discretion. Md. Rule 744.

10. Criminal Law ⇐286

Time within which defendant could enter insanity plea as matter of right was not extended where, within 15-day period preceding defendant's attempted entry of plea, trial court ruled on no "motion, demand for particulars, or other paper * * * requiring a ruling by the court * * * before entering a plea." Md. Rule 723.

11. Criminal Law ⇐286, 1149

Trial court has broad discretion in deciding whether to allow defendant to enter insanity plea and trial court's determination will not be overturned absent clear abuse of discretion, where plea is not raised within time it may be raised as of right. Md. Rules 723, 731, subd. b, par. 2.

12. Criminal Law ⇐641.3(11)

Defendant has no constitutional right to have counsel present at psychiatric examination to determine sanity.

13. Criminal Law ⇐641.3(11)

Defendant is entitled to assistance of counsel in determining whether to submit to psychiatric examination. U.S.C.A. Const. Amend. 6.

14. Criminal Law ⇐286

Defendant, who had consulted with his attorney prior to agreeing to psychiatric examination, and who thereafter refused to go through with examination because attorney would not be present, was not justified in refusing to submit to examination, so that he could not later object that he was not given sufficient opportunity to demonstrate "good cause" needed for untimely entry of insanity plea. Md. Rules 723, 731, subd. b, par. 2.

15. Criminal Law ⇐577.10(6)

Md. Rule 746 and Code 1957, Art. 27, § 591, requiring that prosecution be set for trial within 180 days after earlier of appearance of defense counsel or first appearance of defendant, only addressed situation where case was set and ultimately tried in single circuit court and did not apply when case was removed on defendant's request to other county.

16. Criminal Law ⇐577.9

Criminal case, which has been removed on defendant's request to other county, must be set for trial within 180 days of time case is received by receiving court. Md. Rules 746, Code 1957, Art. 27, § 591.

17. Criminal Law ⇐577.8

Criminal case, which has been removed on state's request to other county, must be set for trial within 180 days of time case is received by receiving court, unless state secured removal in order to circumvent requirements of Md. Rule 723 and Code 1957, Art. 27, § 591, requiring that case be set for trial within 180 days after earlier of appearance of defense counsel or first appearance of defendant.

18. Criminal Law ⇐122

Denial of defendant's request for further removal, based on alleged extensive publicity surrounding murder prosecution, was not abuse of discretion, where prosecution had previously been removed from county where murders were committed.

19. Criminal Law ⇐854.2

Denial of defendant's request for sequestration of jury throughout trial, based on alleged extensive publicity surrounding murder prosecution, was not abuse of discretion, where defendant had no proof of juror prejudice, and where jurors received daily admonitions against exposure to publicity. Md. Rules 751, subd. e, 4-311(e); Code, Courts and Judicial Proceedings § 8-304.

20. Criminal Law ⇐855(1)

Denial of defendant's request for impanelling of new jury, based on alleged discussion between jurors, was not abuse of discretion, as a possibility of prejudice resulting from discussions was adequately

cured by trial court's individual questioning of jurors.

21. Jury ⇐131(13)

Denial of defendant's request to individually voir dire jurors, about potential prejudice resulting from guilty verdict against coconspirator in neighboring county, was not abuse of discretion where trial court had previously instructed jurors not to expose themselves to media publicity, and where trial court questioned jurors en masse as to whether they had heard anything about outcome of coconspirator's case.

22. Criminal Law ⇐1144.15

Appellate court should be slow to impute to juries a disregard of their duties and to trial courts a want of diligence or perspicacity in appraising jury's conduct.

23. Jury ⇐108

Jurors were properly excluded for cause, where each expressed some hesitation about imposing death penalty in murder prosecution, and where, after painstakingly and thoroughly examining jurors, trial court concluded that jurors' views about capital punishment would prevent or substantially impair performance of their duties.

24. Jury ⇐105(2)

Refusal to strike prospective jurors for cause, based on jurors' aversion to drugs and on defendant's alleged involvement in drug trafficking, was not abuse of discretion, though defendant was being prosecuted for murder and not drug trafficking, where jurors indicated that they would make decision based on evidence and law.

25. Homicide ⇐338(1)

In murder prosecution, allowing victim's wife to testify about her relationship with husband was at most harmless error, given overwhelming evidence of defendant's guilt.

26. Criminal Law ⇐438(1), 1153(1)

Admission of photographic evidence is matter best left to sound discretion of trial court, whose determination will not be disturbed unless plainly arbitrary.

27. Criminal Law ⇐438(5)

In murder prosecution, trial court's decision to admit photographs of victims was not abuse of discretion, where photographs were mere graphic representations of undisputed facts already in evidence.

28. Criminal Law ⇐1043(3)

Where specific grounds are delineated for objection, party objecting will be held to those grounds and will ordinarily be deemed to have waived grounds not specified.

29. Criminal Law ⇐1043(3)

Defendant failed to preserve objection to relevancy of certain testimony, where only objection raised at trial was based on hearsay nature of testimony.

30. Conspiracy ⇐45

In prosecution for conspiracy and murder, testimony of victim's wife that coconspirator acted in manner supportive of defendant, to frighten herself and victim from testifying at prior prosecution of defendant, was relevant to show conspiracy.

31. Criminal Law ⇐404(2)

Pistol was admissible as weapon representative of that allegedly used in stalking and in order to link defendant to crime, where weapons expert testified that victim was killed with weapon of that kind, and where witness testified that she had observed conspirator give similar weapon to coconspirator.

32. Criminal Law ⇐433

Display of enlarged letter to jurors did not have prejudicial effect of overemphasizing single piece of evidence, where enlargement was exact copy of original, and where enlargement was employed to demonstrate to jury basis for witness' conclusion that original letter was authored, drafted and signed by defendant.

33. Criminal Law ⇐427(3)

It is not necessary that conspiracy be conclusively established before declarations

...RIES

...determination will not be dis... plainly arbitrary.

...Law ⇐438(5)

...prosecution, trial court's di... photographs of victims was ...iscretion, where photographs ...aphic representations of un... already in evidence.

...Law ⇐1043(3)

...cific grounds are delineated ...erly objecting will be held to ... and will ordinarily be ... waived grounds not spec...

...aw ⇐1043(3)

...failed to preserve objection ...f certain testimony, where ...raised at trial was based on ... of testimony.

...⇐45

...ion for conspiracy and mur... of victim's wife that cocon... n manner supportive of de... ighten herself and victim ... at prior prosecution of de... levant to show conspiracy.

...aw ⇐404(2)

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34. Criminal Law ⇐427(5)

Defendant's letter, visit, and phone calls with conspirators provided ample independent evidence of existence of conspiracy, so that in prosecution for conspiracy and murder, declarations of defendant's coconspirator were admissible as exception to hearsay rule.

35. Homicide ⇐166(1)

Evidence that defendant had been charged with other crimes was admissible, in prosecution for murder of witnesses who would have testified at prior criminal proceeding, to show that defendant had motive for committing homicides.

36. Criminal Law ⇐419(2)

In murder prosecution, testimony by police officer that victims would have identified defendant as party to unrelated offense was not inadmissible hearsay, where victims' extrajudicial statements were not being offered for their truthfulness, but to show that defendant had motive to commit homicides.

37. Criminal Law ⇐1169.2(1)

Admission of police officer's testimony, which was merely cumulative of other evidence offered without objection by defendant, was not reversible error.

38. Criminal Law ⇐666½, 1153(1)

Circumstances under which defendant can conduct pretrial interview of prospective witness are matters best left to trial court's discretion, and trial court's decision will be reversed only for abuse of that discretion.

39. Criminal Law ⇐666½

Trial judge may place limitations and restrictions on party's access to potential witness if in court's discretion such restrictions are reasonably necessary for protection of witness or for security purposes.

40. Criminal Law ⇐666½

Trial court's decision, refusing to allow defendant's request for direct, pretrial examination of coconspirator, was not abuse of discretion, where both defendant and coconspirator were in custody and considered extremely dangerous, where defendant had ample opportunity, prior to his request, to ascertain tenor of coconspirator's testimony, and where trial court, while not allowing defendant to participate in interview, did allow interview to be conducted through defendant's standby counsel.

41. Criminal Law ⇐1036.2

Defendant failed to preserve objection to trial court's ruling, that if coconspirator were called as witness for defense, then State would be allowed to cross-examine him on his *Alford* plea, where defendant made no proffer of what coconspirator's testimony would have been.

42. Criminal Law ⇐539(1)

To be admissible at later proceeding, former testimony must have been given by witness under oath, at proceeding involving substantially the same issues as current proceeding; there must have been reasonable opportunity and similar motivation for cross-examination of declarant by party against whom testimony is being offered; there must be substantial identity of parties and issues, and declarant must be presently unavailable.

43. Criminal Law ⇐544, 545

Trial court's refusal to admit federal grand jury testimony of coconspirator against State was not abuse of discretion, as testimony was obtained during early, exploratory phase of investigation, when federal attorneys were not prepared to cross-examine coconspirator, and as State was not party to federal grand jury proceeding.

44. Criminal Law ⇐541

Md.Rule 740, subd. h, par. 1(d), relating to admissibility and substantive use of depositions at trial, did not apply and could

not serve as basis for admission of transcript of declarant's federal grand jury testimony.

45. **Criminal Law** ⇐594(3)

Trial court's decision, not to allow continuance so that defendant could attempt to secure presence of rebuttal witness, was not abuse of discretion, where witness' presence could not be guaranteed by defendant, and where case was otherwise ready for trial.

46. **Criminal Law** ⇐700(3)

In murder prosecution, defendant was not entitled, prior to being sentenced to death, to statistics as to frequency with which state sought death penalty for defendants charged with murder.

47. **Homicide** ⇐354

Fact that defendant had hired other individual to commit murder was aggravating circumstance which, in murder prosecution, justified imposition of death penalty. Code 1957, Art. 27, § 413(d).

48. **Homicide** ⇐354

Death penalty, which was imposed after defendant was convicted of contracting for murder of state witness scheduled to testify against him, in unrelated criminal proceeding, was not out of proportion to punishment imposed for similar crimes, though defendant had no prior record of conviction for crime of violence, and though he was not sole proximate cause of killing.

49. **Criminal Law** ⇐641.4(5)

Sentencing was not separate proceeding from criminal trial, such that defendant, who had knowingly and intelligently waived right to counsel at trial, could thereafter insist that attorney handle his sentencing. U.S.C.A. Const.Amend. 6.

50. **Criminal Law** ⇐641.7(1)

Md.Rule 723, which mandates that trial court readvise defendant of right to counsel at every separate proceeding, did not require readvisement where defendant had affirmatively waived right to counsel.

51. **Constitutional Law** ⇐203
Homicide ⇐351

Amendment to Code 1957, Art. 41, § 124, allowing court to consider evidence of impact of murder on victim's family and not just on victim as part of sentencing decision, did not change quantum of punishment attaching to crime of murder, so that it did not constitute ex post facto law. U.S.C.A. Const. Art. 1, § 9, Const.Declaration of Rights, Art. 17.

52. **Homicide** ⇐354

To refuse to impose death penalty on defendant convicted of contract killing, jury would have to find some mitigating circumstance, though not necessarily statutory mitigating circumstance. Code 1957, Art. 27, § 413(g)(8).

53. **Homicide** ⇐166(4)

Evidence that defendant had been convicted of possession of heroin and cocaine, including evidence that substances were found in motel room associated with defendant, did not constitute "inflammatory and detailed evidence" of unrelated crime such as would be inadmissible in death penalty case, where murder charge against defendant was based on killing of witness who allegedly would have implicated him in drug trafficking. Code 1957, Art. 27, § 413(c)(1)(iii), (v).

54. **Conspiracy** ⇐28(3)

Conspiracy to murder requires that parties agree to commit murder and that murder be successfully completed.

55. **Homicide** ⇐7

Murder, regardless of whether one is convicted as accessory or principal, requires completed homicide.

56. **Criminal Law** ⇐29

Crimes of murder and conspiracy to commit murder involve separate elements so that defendant could properly be convicted of both crimes, though murder conviction was based solely on his being accessory before fact.

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57. Criminal Law ⇐1035(5)

Defendant, who never requested that juror be removed for misconduct, could not argue on appeal that trial judge should have removed juror sua sponte.

58. Criminal Law ⇐1035(9)

Defendant, who at no time objected to trial court's statement, as part of evidentiary ruling, that there was evidence to support conspiracy, could not raise court's comment as ground for reversal of conviction where trial judge had already advised jury that his legal ruling should not be taken to indicate how he felt about case.

59. Criminal Law ⇐1137(1)

Defendant, who acquiesced in trial court's decision not to allow him to refer to punishments received by his coconspirators, could not urge decision as a ground for reversal.

60. Homicide ⇐354

Fact that defendant had murdered more than one party constituted aggravating circumstance, which justified imposition of death penalty for both murder convictions.

61. Homicide ⇐234(5)

Defendant's conviction of murdering state witness in unrelated criminal prosecution was supported by statements of coconspirators that defendant hired other party to commit murder, as well as by statements of other witnesses showing that defendant had talked with conspirators on various occasions. Code 1957, Art. 27, § 413(d)(7).

62. Criminal Law ⇐798

No instruction on effect of deadlock was required where jury, in prosecution for murder which extended over many days, reached verdict in one and one-quarter hours.

63. Homicide ⇐17

Defendant, who contracted with other party for murder of state witness in unrelated prosecution, was guilty of murder under doctrine of "transferred intent" when hired killer mistakingly killed wrong party.

64. Homicide ⇐354

Imposition of death penalty was authorized, though defendant was guilty of murder only as accessory and not as principal in first degree, where defendant had employed another person to commit murder. Code 1957, Art. 27, § 413(d)(7), (e)(1).

Nancy L. Cook, Assigned Public Defender, Washington, D.C., for appellant.

Deborah K. Chasanow, Asst. Atty. Gen. (Stephen H. Sachs, Atty. Gen., on brief), Baltimore, for appellee.

Argued before MURPHY, C.J., and SMITH, ELDRIDGE, COLE, RODOWSKY, COUCH and McAULIFFE, JJ.

COUCH, Judge.

The appellant, Anthony Grandison, Sr., was charged in Baltimore County with conspiracy to murder Scott and Cheryl Piechowicz, first degree murder of Scott Piechowicz and Susan Kennedy, and use of a handgun in the commission of a crime of violence. Grandison challenges the verdict of guilt and the subsequent death sentence imposed by a jury in the Circuit Court for Somerset County where he was tried on his request for removal. He raises a host of grounds for reversal. As we conclude that none of these grounds involves reversible error, we shall affirm.

With respect to the underlying facts giving rise to the charges against Grandison, we recently recited them in *Evans v. State*, 304 Md. 487, 494-95, 499 A.2d 1261, 1264-65 (1985), and therefore shall borrow from that recitation as follows:

"According to the State's evidence, the defendant Evans and Anthony Grandison entered into an agreement whereby Evans would kill David Scott Piechowicz and his wife, Cheryl, because the couple were scheduled to testify against Grandison in a narcotics case pending in the United States District Court for the Dis-

trict of Maryland. Evans was to receive $9,000.00 from Grandison for performing the murders.

David Scott Piechowicz and Cheryl Piechowicz were employed at the Warren House Motel in Baltimore County. On April 28, 1983, Susan Kennedy, the sister of Cheryl Piechowicz, was working in place of Cheryl at the Warren House Motel. The evidence was sufficient to prove beyond a reasonable doubt that, on April 28th, Evans went to the motel and, not knowing the Piechowiczs, shot David Scott Piechowicz and Susan Kennedy with a MAC-11 machine pistol. Nineteen bullets were fired at the victims, who died from multiple gunshot wounds.

A two count indictment was filed against Evans and Grandison in the United States District Court. They were charged with violating the Piechowiczs' civil rights by interfering with their right to be witnesses in a judicial proceeding, in violation of 18 U.S.C. § 241, and with witness tampering, in violation of 18 U.S.C. § 1512.

Subsequently the present case began with a four count indictment in the Circuit Court for Baltimore County, charging Evans and Grandison each with two counts of first degree murder, one count of conspiracy to commit murder, and use of a handgun in the commission of a felony or crime of violence. Upon the defendants' requests for removal, Grandison's trial was transferred to the Circuit Court for Somerset County and Evans's trial was transferred to the Circuit Court for Worcester County."

Prior to the trial in the instant case, Grandison and Evans were convicted on the federal charges and sentenced to life plus ten years imprisonment. They then filed pretrial motions to dismiss the charges in their respective state cases on double jeopardy grounds. The motions were denied by the trial judges, and this Court affirmed *Evans and Grandison v. State*, 301 Md. 45, 481 A.2d 1135 (1984), *cert. denied*, — U.S. —, 105 S.Ct. 1411, 84 L.Ed.2d 793 (1985).

Thereafter, the trial proceeded in Somerset County and Grandison was found guilty of all charges. Subsequently, a sentencing proceeding was held pursuant to Maryland Code, Art. 27, § 413, wherein the jury imposed death penalties for the two murder convictions. The trial judge also sentenced Grandison to life imprisonment for the conspiracy conviction and twenty years for the handgun violation consecutive to the life sentence. These sentences were imposed to run consecutively to the life plus ten years sentence previously imposed in the federal case.

We shall now address Grandison's arguments in turn as raised.

I

Failure to Inquire into Mental Capacity of State Witness Sparrow

Grandison complains that his constitutional right of witness confrontation and cross-examination was impaired by the trial court's refusal to permit appropriate steps to be taken to determine the mental capacity and veracity of State's witness Charlene Sparrow. Vernon Evans raised the same issue in his trial in the Circuit Court for Worcester County. In *Evans v. State*, 304 Md. 487, 508, 499 A.2d 1261, 1272 (1985), we stated in pertinent part:

> "In determining whether a request for a mental examination should be granted, however, a trial judge should carefully balance the demonstrated necessity for a compelled examination against the existence of important countervailing considerations. In affirming the denial of a motion for a psychiatric examination of a government witness, the United States Court of Appeals for the District of Columbia Circuit, in *United States v. Brown*, 476 F.2d 1127, 1131 (D.C.Cir.1972), listed some of the factors to be considered:
>
> '[A] psychiatric examination may seriously impinge on a witness' right to privacy; the trauma that attends the

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could serve as a tool of harassment,
and the impact of all these considera-
tions may well deter the victim of ... a
crime from lodging any complaint at
all. Since there is no exact measure
for weighing these kinds of dangers
against the need for an examination,
the decision must be entrusted to the
sound discretion of the trial judge in
light of the particular facts."

Accord, United States v. Butler, 481
F.2d 531 (D.C.Cir.1973). *See Resnick v.
State*, 7 Md.App. 564, 571-572, 256 A.2d
543 (1969), *cert. denied*, 400 U.S. 835, 91
S.Ct. 70, 27 L.Ed.2d 67 (1970)."

What we stated in *Evans* is applicable here
and is dispositive of the issue. Hence, the
trial court did not commit reversible error.

II

Venue

Grandison next argues that the indict-
ments handed down in Baltimore County
are void since venue for the crimes charged
did not lie in Baltimore County.

Grandison was indicted on June 30, 1983
in Baltimore County; he was ultimately
tried and convicted in Somerset County
pursuant to his suggestion for removal un-
der former Maryland Rule 744.[1] The ap-
pellant argues that since the acts commit-
ted constituting the crimes of accessory
before the fact to murder, conspiracy, and
unlawful use of a handgun in commission
of a crime of violence indisputably occurred
in Baltimore City, he was wrongfully in-
dicted and prosecuted in Baltimore County.

Prior to trial, Grandison moved to dis-
miss the conspiracy count (Count III) of the
indictment on the ground that the Grand
Jury for Baltimore County lacked jurisdic-
tion. At the February 27, 1984 hearing, he
amended his motion to dismiss to allege
improper venue. Judge Simpkins denied
the motion, relying on *Lievers v. State*, 3
Md.App. 597, 241 A.2d 147 (1968) and
Greenwald v. State, 221 Md. 245, 157 A.2d
119, *appeal dismissed*, 363 U.S. 721, 80
S.Ct. 1599, 4 L.Ed.2d 1521 (1960). We hold
that Judge Simpkins committed no error in
denying Grandison's motion to dismiss.

(A)

[1] This Court has held that if conspira-
tors enter into an illegal agreement in one
county and go into another county to exe-
cute or carry out their illegal plans and
there commit an overt act in furtherance of
their agreement, each of the conspirators
may be tried in either county; evidence of
an express renewal of their agreement
need not be established to prosecute the
conspirators in the county where the overt
act was committed. *Greenwald*, 221 Md.
at 254, 157 A.2d at 124, quoting from *Peo-
ple v. Mather* (N.Y.), 4 Wendall 229, 259, 21
Amer. Dec. 122, 147.

The underlying rationale for this princi-
ple lies in what has been termed the "con-
tinuing nature of conspiracy," that is
"The law considers that wherever [the con-
spirators] act, there they renew, or
continue their agreement, and this agree-
ment is renewed or continued as to a
whenever any of them does an act in fur-
therance of their common design." *Green-
wald*, 221 Md. at 254, 157 A.2d at 124.

In *Lievers*, the Court of Special Appeals
recognized the rule that a conspiracy may
be prosecuted "where the illegal agreement
arose, or where [the] overt act in further-
ance of the agreement occurred ..." 3
Md.App. at 605, 241 A.2d at 152.

Chief Judge Murphy, in writing for the
Court of Special Appeals in *Boddie v.*

1. Former Md.Rule 744 provided:

"a. *Capital Cases.*

Where a defendant is charged with an offense for which the maximum penalty is death and a party files a suggestion under oath that he can not have a fair and impartial trial in the coun in which the case is pending, the court sha order that the case be transmitted for trial to another court having jurisdiction. A suggestion filed by a defendant shall be under his persona oath. A suggestion filed by the State shall be under the oath of the State's Attorney."

State, 6 Md.App. 523, 252 A.2d 290 (1969), applied the holding of *Lievers*. In *Boddie*, the appellants were in the State of Maryland when the overt act in furtherance of the conspiracy to rob occurred. However, the illegal agreement in that case seemingly took place outside of the territorial limits of the state. Nonetheless, the court held if the evidence could sustain a finding that a conspiracy existed, the conspirators could be punished in Maryland. *Boddie*, 6 Md. App. at 529, 252 A.2d at 293. This rule is in accord with, and indeed follows from, decisions rendered by the Supreme Court. In *Hyde v. United States*, 225 U.S. 347, 32 S.Ct. 793, 56 L.Ed. 1114 (1912), the Court was considering whether venue in a conspiracy case under § 5440 Rev. Stat. (1901) properly lies in the state or district where the conspiracy was entered into or any state or district where an overt act in furtherance of the conspiracy was performed. In its analysis, the Court stated "that a conspiracy is not necessarily the conception and purpose of the moment, but may be continuing." *Id.* at 363, 32 S.Ct. at 800, 56 L.Ed. at 1124. Moreover, wherever the conspirators act there they "renew, or perhaps, to speak more properly, they continue, their agreement, and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design." *Id.* at 365, 32 S.Ct. at 801, 56 L.Ed. at 1125 (quoting *Robinson v. United States*, 172 Fed. 105 (8th Cir.1909)); *accord United States v. Kissel*, 218 U.S. 601, 608, 31 S.Ct. 124, 126, 54 L.Ed. 1168 (U.S.N.Y. 1910); *see United States v. Mayo*, 721 F.2d 1084, 1090 (7th Cir.1983); *see generally* 1 F. Wharton, *Criminal Law* § 14 (14th ed. 1978).

We note that, though the Court in *Hyde* was analyzing a statute which required allegation and proof of an overt act, it still accepted the characterization of a conspiracy as "continuing" and "ongoing." *See Mayo*, 721 F.2d at 1090. Such a characterization convinces us that the rule expressed in *Lievers* and applied in *Boddie* is sound.

Accordingly, appellant's argument must fail. Since the murders occurred in Baltimore County and were a contemplated result of an ongoing, continuing scheme of which appellant was co-author, venue for the conspiracy count was proper in Baltimore County.

(B)

Grandison next attempts to specifically challenge venue for the murder and handgun counts as being improperly set in Baltimore County. He argues that since he was indicted and prosecuted outside the county in which the acts he committed occurred, Baltimore City, the indictment charging him as an accessory before the fact to murder and of a handgun violation should have been dismissed.

[2] The short answer to appellant's contention is that venue for the murder and handgun counts was never challenged in the trial court.[2] Thus, this argument was waived. Md. Rule 885.[3] *McBurney v. State*, 280 Md. 21, 32–33, 371 A.2d 129, 135–36 (1977).

However, considering the nature of the proceedings before us, we entertain appel-

2. It is clear from the transcript of February 27, 1984 that Grandison sought only to dismiss Count III (conspiracy) of the indictment on the basis that venue was improper.

3. Maryland Rule 885 provides:

"*Rule 885. Scope of Review—Limited to Questions Decided by Circuit Court.*

This Court will not ordinarily decide any point or question which does not plainly appear by the record to have been tried and decided by the circuit court, but when a point or question of law had been presented to the court and a decision of that point or question of law by this Court is necessary or desirable for the guidance of the circuit court, or to avoid the expense and delay of another appeal to this Court, the point or question of law may be decided by this Court even though it was not decided by the circuit court. When jurisdiction cannot be conferred on this Court by waiver or consent of the parties, a question as to the jurisdiction of the circuit court may be raised and decided in this Court whether or not raised and decided in the circuit court."

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lecision of that point or question s Court is necessary or desirable ance of the circuit court, or to ense and delay of another appeal the point or question of law may y this Court even though it was by the circuit court. When juris- n be conferred on this Court by ment of the parties, a question as ction of the circuit court may be ecided in this Court, whether or ed decided in the circuit court

lant's argument but are compelled to summarily dismiss it as being without merit.

[3] It is a generally recognized principle that where the existence of a conspiracy is established, the law imposes upon a conspirator full responsibility for the logical and natural consequences of acts committed by his fellow conspirators if such acts are done in pursuance of the common design or purpose of the conspiracy. *See U.S. v. Wenzel*, 311 F.2d 164 (4th Cir.1962); *Urciolo v. State*, 272 Md. 607, 631, 325 A.2d 678, 692 (1974) (embezzlement). *Accord Commonwealth v. Thomas*, 410 Pa. 160, 189 A.2d 255, 258, *cert. denied*, 375 U.S. 836, 84 S.Ct. 118, 11 L.Ed.2d 83 (1963). Such responsibility attaches even though the conspirator was not physically present when the acts were committed by his fellow conspirators and would extend even to a homicide which is a contingency of a natural execution of the conspiracy, even though such homicide is not specifically contemplated by the parties. *See Urciolo*, 272 Md. at 631, 325 A.2d at 892; *accord Thomas*, 189 A.2d at 258. *See generally*, 1 F. Wharton, *supra*; 21 Am.Jur.2d §§ 386-87 (1965).

[4] This rule rests on the underlying principle that one who encourages, aids, abets, or assists the active perpetrator in the commission of the offense, is a guilty participant and in the eye of the law is equally culpable with the one who does the act. *See, e.g., Urciolo*, 272 Md. 607, 325 A.2d 678; *accord Bloomer v. State*, 48 Md. 521 (1878); *see Ex Parte Williams*, 383 So.2d 564, 565 (Ala.), *cert. denied*, 449 U.S. 995, 101 S.Ct. 534, 66 L.Ed.2d 293 (1980). And this criminal accountability extends to the proximate, natural and logical consequences of the conspiracy. *Williams*, 383 So.2d at 565. It follows that the law looks upon such a conspirator as an actual participant in the contemplated offense. In short, the act of the co-conspirators in the case at bar was the act of Grandison.

[5] The determination of venue in the instant case must rely upon this theory of vicarious criminal responsibility which arises out of the existence of the conspiracy. The conspiracy in which Grandison took part had as its goal and sole objective the homicides of two victims. As a co-conspirator, Grandison became criminally responsible for the acts of his fellow conspirators; acts which were committed in Baltimore County. Since the record reveals that in this conspiracy Grandison played a principal role, he is subject to venue at the situs of the crime. Accordingly, in our view, had the issue been properly raised, it would be without merit.

III

Separate Trials as to Counts

Grandison also asserts that the charges of conspiracy and handgun violation were improperly tried in Somerset County in conjunction with the murder charges.

Appellant was charged in a four count indictment with the murders of Scott Piechowicz and Susan Kennedy, conspiracy to murder Scott and Cheryl Piechowicz, and use of a handgun in the commission of a crime of violence. He sought removal of the case for trial without reference to counts. Subsequently, he moved to separate the trial of the conspiracy count from the trial of all other counts. Appellant argued that he intended to take the witness stand in his own defense with respect to the conspiracy charge but wished to remain silent with respect to the murder charges. After the proceedings were removed to Somerset County, the motion for separate trials was denied. We perceive no error in the denial of appellant's motion.

[6] It is uncontroverted that the decision as to whether to grant a severance lies within the sound discretion of the trial court. *Stevenson v. State*, 43 Md.App. 120, 130, 403 A.2d 812, 818 (1979), *aff'd*, 287 Md. 504, 413 A.2d 1340 (1980); *State v. Jones*, 284 Md. 232, 236, 395 A.2d 1182, 1185 (1979). The trial court, in exercising its discretion, is required to balance the likely prejudice to the accused against the

possible effects on economy and efficiency in judicial administration. *McKnight v. State*, 280 Md. 604, 609-10, 375 A.2d 551, 555 (1977).

[7] Moreover, we note that in considering a charge of conspiracy, the overt acts of the conspirators in the commission of the crime are clearly relevant and material to the proof of the conspiracy. *See Jones v. State*, 8 Md.App. 370, 379-80, 259 A.2d 807, 813 (1969); *Hill v. State*, 231 Md. 458, 461, 190 A.2d 795, 796 (1963). It follows that in the case at bar, evidence of the homicides and surrounding circumstances is relevant and material to the conspiracy which in the first instance contemplated and directed their commission. The homicides at issue here are clearly related to the conspiracy.[4]

[8] Additionally, absent authority to the contrary, it would be "foolhardy and purposeless to require as of right two trials—one for a crime committed and one for conspiracy to commit the same crime." *Green v. State*, 25 Md.App. 679, 686, 337 A.2d 729, 733 (1975). At trial, appellant offered no authority or compelling justification for a finding that a severance was warranted. Only the following took place at the February 27, 1984 hearing, in pertinent part:

"THE COURT: Three. Motion for Separate Trials under Counts 1, 2 and 4. I guess what you're saying, you're asking that Counts 1, 2 and 4 be tried and that Count 3 be tried separately.

Counts 1 and 2 are murder, first degree murder, and 4 is a handgun violation, and 3 is conspiracy. What you're saying is that the charges be severed and that we have two separate trials.

All right. I'm ready to hear from you on that. You want to be heard on that, sir?

MR. GRANDISON: Yes, sir. Yes, Your Honor.

THE COURT: All right, sir.

MR. GRANDISON: The position on this motion is that counts should be severed because I intend to take the stand as to Count 3, but not as to Counts 1 and 2, which the State is seeking the death penalty. My position is that if cases are tried jointly, if I take the stand, then I would be subject to being cross-examined as to any prior conviction that I may have. I feel that this might be very prejudicial to me as to those two counts which the State is seeking the death penalty.

THE COURT: Are you saying that the reason those counts should be separate is because—did I understand you to say in Counts 1 and 2 you don't want to take the stand, but on Count 4 you do?

MR. GRANDISON: Count 3 is the conspiracy offense. I intend to take the stand and testify, offer testimony.

THE COURT: I see.

MR. GRANDISON: But as to Count 1 and 2, I do not wish to testify.

THE COURT: All right. And because of that, you think the cases should be separated, that the counts should be separated. Is that the only reason?

MR. GRANDISON: That's not the only reason. I have additional reasons in my memorandum.

THE COURT: What are they?

MR. GRANDISON: I'm sorry, Your Honor. I have no additional reasons other than what I stated.

. . . . . .

MR. GRANDISON: The conspiracy offense in this case is a distinct offense from the substantive offense which is first degree murder charges. I don't believe it to be true that evidence that would be admissible in the conspiracy count would be admissible as well in the first degree murder case.

4. Appellant does not argue that the conspiracy under which he is charged is unrelated to the homicides committed in furtherance of the conspiracy. *Cf. McKnight v. State*, 280 Md. 604, 375 A.2d 551 (1977).

ERIES

URT. All right, sir.

ANDISON: The position on is that counts should be sev- se I intend to take the stand 3, but not as to Counts 1 and e State is seeking the death y position is that if cases are , if I take the stand, then I bject to being cross-examined prior conviction that I may el that this might be very o me as to those two counts ate is seeking the death pen-

RT: Are you saying that the counts should be separate is I I understand you to say in d 2 you don't want to take it on Count 4 you do?

SDISON: Count 3 is the conse- I intend to take the stify, offer testimony.

RT: I see.

SDISON: But as to Count 1 ot wish to testify.

RT: All right. And because think the cases should be at the counts should be sep- at the only reason?

NDISON: That's not the I have additional reasons in fun-

:T: What are they?

:DISON: I'm sorry. Your e no additional reason other tated."

* * * *

DISON: The conspiracy of- case is a distinct offense stantive offense which is murder charges. I don't e true that evidence that issible in the conspiracy e admissible as well in the urder case.

night v. State, 280 Md. 604, 375

I have no authority rightly before me to support that position. I think this is—the law is clear on that as well as the rules, that evidence may be admissible in[5] a conspiracy, but not be admissible to substantive offense.

I think that I am entitled to a separate trial on these two counts, especially in light of the fact that I have presented to the Court that I wish to take the stand as to the conspiracy and not as to the first degree murder counts.

This is not no ordinary run-of-the-mill case. The State is seeking the death penalty on first count of the indictment, the first two counts of the indictment. I think the situation would be different from any other case and I think that I'm entitled to a separate trial on these counts, and I submit."

* * * * * *

"MR. GRANDISON: Your Honor, offer one additional thing. To force me into a trial of Count 3 along with the first two counts in the indictment would be a—put me in the position where I would have to offer defense for my alleged co-defendant as well, where I wouldn't be in that position if I was being tried separate for both counts. But being as the conspiracy count, the State would allege different things as act or allegedly committed by three co-defendants which would force me in a position to have to defend the act allegedly committed by them which I think would be very prejudicial and no way could I receive a fair trial being tried in all these counts together."

We are unable to find any authority for the proposition that a trial court is required to grant a motion for separate trials as a matter of right to a criminal defendant upon an allegation by that defendant that he wishes to testify on less than all counts charged against him. In this case, Grandison has done little more than express a generalized desire to testify as to some counts but not others. He has not indicated what he would or would not have testified to and whether such testimony would have been of any particular importance. We are thus unable to conclude that appellant has demonstrated compelling prejudice resulting from denial of the motion for separate trials when we have been given no indication that testimony to be offered or withheld by appellant had any value. *See McKnight*, 280 Md. at 609–10, 375 A.2d 551.

Therefore, we conclude that Grandison's bare allegation proffered in support of his motion, with nothing more under the record before us is no basis for mandating a severance of trial. *See, e.g., United States v. Corbin*, 734 F.2d 643, 648–49 (11th Cir.1984). It follows, then, that there was no abuse of discretion on the part of the trial court in denying appellant's motion for separate trials.

[9] Considering the allegation that the conspiracy and handgun counts were improperly removed along with the murder counts from Baltimore County in the first instance, we conclude this argument to be without merit.

As Judge Simpkins correctly noted at trial, "You remove the whole case, not parts of it." More particularly, former Md. Rule 744[6] speaks in terms of transferral of the "case" or "case file."

Further, in *Stevenson v. State*, 9 Md. App. 152, 263 A.2d 36 (1970), the Court of Special Appeals held that "[E]ven though [an] indictment contains other counts which charge offenses which are not punishable by death, those offenses are carried along with the removal of the offense that is or may be punishable by death, and are also removed for trial." *Id.* at 162, 263 A.2d at 41.

Finally, we note that appellant's initial motion did not express the intent to remove only the murder counts from Baltimore County. Indeed, appellant's "Motion and Affidavit for Removal of Trial" filed in this

5. *See supra* note 1 and accompanying text.

case demanded a removal of appellant's *trial*. As we have stated herein, it was proper for appellant's entire *trial*, encompassing all counts which were enumerated in the Baltimore County Grand Jury Indictment to be removed pursuant to former Md.Rule 744.

Therefore, in light of the plain language enunciated in former Md.Rule 744 and *Stevenson*, 9 Md.App. 152, 263 A.2d 30, we hold that the trial court did not err in transferring the entire proceeding to Somerset County.

IV

Insanity Plea

We turn now to the issue of whether the trial court erred in refusing to grant appellant's request to file a plea of insanity. The request was made on April 25, 1984, the day before trial was scheduled to begin.

The procedures governing the assertion of the insanity defense at the time of the Grandison trial were dictated by section 12-108 of the 1982 Health—General Article of the Maryland Code and former Maryland Rule 731.[6] The rule and the statute must be read in conjunction. Their combined provisions require the defense of insanity to be interposed in writing at the time the initial plea is made; the initial plea must be made within fifteen days after the earlier of the appearance of counsel or the first appearance of the defendant before the court pursuant to former Md. Rule 723. This period is automatically extended if a motion, demand for particulars, or other paper requiring a ruling by the court or compliance by a party before entering a plea is filed. Former Md. Rule 731 b 2. Such a filing delays the deadline for entering a plea until fifteen days after the court has ruled on the motion. *Id.*

Both the statute and the rule provide for an exception to these time constraints. The court may accept an insanity plea at any time before commencement of the trial upon a showing of "good cause."

Appellant posits two theories under which he contends the trial court should have accepted his insanity plea. First, he asserts that his plea was timely under former Rule 731 b 2, and the court was therefore without discretion to reject it. In the alternative, appellant argues that he made an adequate showing of "good cause" as required by § 12-108 and former Rule 731 b 2, hence he was entitled to plead insanity prior to the commencement of trial.

[10] Appellant's first argument fails since no "motion, demand for particulars, or other paper . . . requiring a ruling by the court or compliance by a party before entering a plea" was ruled upon by the court in the fifteen day period preceding his attempted entry of the insanity plea.[7] Consequently, the automatic extension of former Rule 731 b 2 does not come into play. Since the defendant made his first Rule 723 appearance before the court on July 19, 1983, the fifteen day period during which he had a right to file the insanity plea had expired long before April 25, 1984.

[11] Thus, Grandison was entitled to enter a late plea of insanity only upon a showing of "good cause." Maryland Code

6. The provisions of § 12-108 of the 1982 Health—General Article of the Maryland Code can now be found in § 12-109(a)(1) and (2) of that article. Maryland Code (1982, 1985 Cum. Supp.), Health—General Article, § 12-109; *see* 1984 Md.Laws 501. The provisions of former Md.Rule 731 a are now contained in Maryland Rule 4-242(a) while former Rule 731 b 2 is now Rule 4-242(b)(3).

7. The docket reflects that in the fifteen day period from April 11, 1984 to April 26, 1984, the following rulings were made by the circuit court: April 11, 1984—Defendant's Motion for Re-removal denied; April 13, 1984—Defendant's Motion to Withdraw Voluntarily or to Otherwise Disqualify Judge denied; April 16, 1984—Order to issue subpoena duces tecum; April 18, 1984—Order to transfer inmate issued; April 19, 1984—Order to issue subpoena duces tecum; April 19, 1984—Defendant's Motion for Continuance denied; April 25, 1984—Order for mental examination of defendant issued; April 26, 1984—Defendant's Renewal of Motion for Continuance denied; April 26, 1984—Defendant's Motion for Individual Voir Dire granted in part.

(1982), Health—General Article, § 12-106, former Md.Rule 731 b 2. Although not in the context of the insanity plea, we have previously held that a statutory requirement of "good cause" vests the trial court with wide discretion. *See State v. Frazier*, 298 Md. 422, 470 A.2d 1259 (1984) (discussing "good cause" in context of postponement of trial date); *State v. Jones*, 270 Md. 389, 312 A.2d 281 (1973) (analysis of "good cause" requirement to permit a requested withdrawal of an accused's jury trial waiver). We now hold that the "good cause" requirements of § 12-106 and former Rule 731 likewise endow the trial court with broad discretion. Thus the trial judge's determination is entitled to the utmost respect and should not be overturned unless there was a clear abuse of that discretion. *Madore v. Baltimore County*, 34 Md.App. 340, 346, 367 A.2d 54, 58 (1976).

Because we feel that Judge Simpkins' ruling was not the result of an abuse of discretion, we refuse to disturb it. The only evidence proffered by the defense at the hearing to determine whether there was "good cause" warranting the acceptance of a late insanity plea was the appellant's unsubstantiated allegations that he had been committed to a mental hospital at age nine and that "as late as 1980—the Court psychiatrist had determined [him] to be functioning on the borderline."

The paucity of proof was a direct result of the appellant's refusal to submit to a court provided psychiatric examination which ironically had been initiated pursuant to appellant's April 25, 1984 request that the court "arrange proper psychiatric examination." At the April 26, 1984 hearing Judge Simpkins gave a first hand account of the events precipitated by Grandison's request for a mental evaluation:

> "[I]t was filed by the defendant 19 hours before Court was to start. In order to save time and to comply with this, to get him the examination that he requested in the plea and to give him the hearing that he requested and to give him the findings of the examination, I contacted a psychiatrist who is employed by the Department of Health and Mental Hygiene, and asked him if he would arrange for a psychiatric examination. He was kind enough to arrange that examination after he got off work last night.
>
> He went to the Wicomico County Detention Center last night at 5:15 to meet with Mr. Grandison. He met with Mr. Grandison. Mr. Grandison wouldn't talk with him.
>
> . . . . . .
>
> Now, that put us in this position. This man wanted then, before we do anything else, before he would be interviewed by the doctor, as he had requested, he refused to talk to the doctor until he had a chance to talk to his standby counsel—not his counsel, because he was representing himself, but to his standby counsel—who was then some 35 miles away in another county, which would have meant we had to get hold of Crawford [standby counsel], get Crawford, find him, get him to the Detention Center in Salisbury, have the conversation, hoping the doctor—who was doing the Court a favor—would agree to stick around, have the examination, type up the findings sometime before 9:30 this morning, and have it all done in time for Court at 9:30, a ridiculous situation."

[12] In our view, the trial court afforded Grandison ample opportunity to adduce evidence of "good cause" for allowance of the late insanity plea. His failure to do so was the result of his unjustifiable refusal to cooperate with the court appointed psychiatrist. There is no constitutional right to have counsel present at a psychiatric examination to determine sanity. *United States v. Byers*, 740 F.2d 1104 (D.C.Cir. 1984); *United States v. Cohen*, 530 F.2d 43, 46 (5th Cir.), *cert. denied*, 429 U.S. 855, 97 S.Ct. 149, 50 L.Ed.2d 130 (1976); *United States v. Bohle*, 445 F.2d 54, 67 (7th Cir. 1971); *United States v. Baird*, 414 F.2d 700, 711 (2d Cir.1969), *cert. denied*, 396 U.S. 1005, 90 S.Ct. 559, 24 L.Ed.2d 497

(1970); *United States v. Albright*, 388 F.2d 719, 725–27 (4th Cir.1968).

[13, 14] A defendant is, however, entitled to the assistance of counsel in determining whether to submit to a psychiatric examination. *Estelle v. Smith*, 451 U.S. 454, 471, 101 S.Ct. 1866, 1877, 68 L.Ed.2d 359, 374 (1981). Since Grandison was acting as his own counsel, the only possible complaint he might have is that he was denied assistance of standby counsel in determining whether to undergo mental evaluation. However, the April 25, 1984 "Plea" itself reflects that this was not so. It requests that the court "arrange proper psychiatric examination of Defendant" and is signed by both the defendant and his standby counsel. Also, at the April 26th hearing, standby counsel, acting at the request of the defendant, stated that prior to the filing of this plea "Mr. Grandison and I had a considerable discussion about the fine distinction between competency to stand trial and insanity at the time the crime was committed." Thus, it is clear that the decision to undergo psychiatric evaluation was made after consultation with standby counsel. Therefore, there was no excuse for appellant's subsequent refusal to proceed with the examination. He cannot now complain that he was not given an opportunity to demonstrate "good cause" or that the trial court's refusal of the insanity plea was in error. The defense did not demonstrate "good cause" for entry of the late plea. Thus, the trial judge properly exercised his discretion in refusing to accept the insanity plea.

V

Violation of Former Md.Rule 746

Grandison claims that the charges against him should have been dismissed because he was not tried within 180 days of his arraignment and there was no postponement for good cause by an administrative judge pursuant to Maryland Code (1957, 1982 Repl. Vol., 1985 Cum.Supp.), Art. 27, § 591 and former Md.Rule 746.[8] The record reveals that Grandison was first arraigned in the Circuit Court for Baltimore County on July 19, 1983, thus the 180 days requirement of Rule 746 started to run making January 15, 1984 the expiration date before which the case was to be tried in the Circuit Court for Baltimore County. Trial was initially set for November 11, 1983, but was subsequently postponed until January 3, 1984. The case was removed from the Circuit Court for Baltimore County to the Circuit Court for Somerset County on December 16, 1983, on Grandison's motion. The record is silent as to what, if anything, occurred on January 3, 1984. It is clear, however, that on January 20, 1984 the Circuit Court for Somerset County set the trial date for April 26, 1984. Grandison moved to dismiss based on two grounds: first, he argued to the trial judge that once the 180 days had elapsed (January 15, 1984)

8. Now Md.Rule 4-271, which provides:

Rule 4-271. Trial date

(a) *Trial Date in Circuit Court.*—The date for trial in the circuit court shall be set within 30 days after the earlier of the appearance of counsel or the first appearance of the defendant before the circuit court pursuant to Rule 4-213, and shall be not later than 180 days after the earlier of those events. On motion of a party, or on the court's initiative, and for good cause shown, the county administrative judge or that judge's designee may grant a change of a circuit court trial date.

Art. 27, § 591 provides:

§ 591. Setting date for trial; postponement.

(a) Within two weeks after the arraignment of a person accused of a criminal offense, or within two weeks after the filing of an appearance of counsel or the appointment of counsel for an accused in any criminal matter, whichever shall occur first, a judge or other designated official of the circuit court in which the matter is pending, shall set a date for the trial of the case, which date shall be not later than 180 days from the date of the arraignment of the person accused or the appearance or the appointment of counsel for the accused whichever occurs first. The date established for the trial of the matter shall not be postponed except for good cause shown by the moving party and only with the permission of the administrative judge of the court where the matter is pending.

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former Md.Rule 746

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the trial court no longer had any jurisdiction. Secondly, he claimed that the administrative judge did not grant the postponement as required by the rule.

Both Art. 27, § 591 and former Rule 746 provide that trial shall be set within 180 days after the earlier of the appearance of counsel or the first appearance of the defendant before *the* circuit court. The statute and rule also provide that, for good cause shown, *the* County Administrative Judge may grant a change of a circuit court trial date.

[15] In our view the rule is simply inapplicable here where at Grandison's request the case was removed to the Circuit Court for Somerset County less than a month before the January 3, 1984 trial date set in the Circuit Court for Baltimore County. This is readily understandable since the statute and rule only address the situation where a case is set and ultimately tried in a *single* circuit court, and not where a trial date has been set in one circuit court but the case has been removed to a different circuit court for trial. Indeed, to conclude that Art. 27, § 591 and former Rule 746 similarly cover removal situations would be to render useless and ineffective the principal requirement contemplated by the statute and rule. Judge Eldridge, speaking for the Court in *State v. Frazier*, 298 Md. 422, 453, 470 A.2d 1269 (1984), stated:

> "The major safeguard contemplated by the statute and rule, for assuring that criminal trials are not needlessly postponed beyond the 180-day period, is the requirement that the administrative judge or his designee, rather than any judge, order the postponement. This is a logical safeguard, as it is the administrative judge who has an overall view of the court's business, who is responsible 'for the administration of the court,' who assigns trial judges, who 'supervises the assignment of actions for trial,' who supervises the court personnel involved in the assignment of cases, and who receives reports from such personnel." (footnotes omitted).

Clearly then former Rule 746 was not designed to cover the removal situation. In such a situation, the administrative judge of the circuit court from which the case was removed would be unable to fulfill those functions contemplated by the statute and rule. *Id.* Similarly, to expect and require that the receiving court adhere to the trial schedule set forth in the former circuit court would be to bestow upon the administrative judge of the receiving court an unreasonable burden which oftentimes could result in an impossible task. Understandably, this was recognized by the trial judge in Somerset County who, in denying Grandison's motion to dismiss, stated in part:

> "Obviously, when you ask for removal like that, you automatically extend the trial date. There is no way in this county we could have tried it on the 3rd of January. No. 1, we only had 12 days because of the Christmas holiday and weekends and New Year's holiday, and we have the problem of cancelling out four or five months of cases that had already been scheduled to be tried. We only have one judge and one courtroom in this county, so it became necessary to continue the trial date at the request of the defendant."[9]

[16] We hold therefore that when a criminal case is removed on a defendant's request, the trial date assigned in the forwarding circuit court pursuant to Art. 27, § 591 and present Rule 4-271 is without effect. We further hold that under such conditions the 180-day period begins to run anew in the receiving circuit court from the time the case is received therein. A defendant also remains protected by his speedy trial rights under the federal and state constitutions.

[17] We also point out that this holding is equally applicable where the State obtains the removal, but with some limitation

ever asked for a continuance.

If it appears that such removal was for the purpose of or had the necessary effect of circumventing the requirements of the statute and the rule, the original trial date will hold. *See Cawley v. State*, 299 Md. 449, 474 A.2d 502 (1984) (charges refiled following nolle prosequi); *State v. Glenn*, 299 Md. 464, 474 A.2d 509 (1984); and compare *State v. Phillips*, 299 Md. 468, 474 A.2d 512 (1984).

Accordingly, we find no merit to Grandison's contentions on this issue.

VI

Violation of Interstate Agreement on Detainers

It is next contended that because he was not tried within 120 days of being returned to Maryland, the State violated Maryland Code, Art. 27, § 616E, and thus the indictment against him must be dismissed. Grandison argues that he was brought to the Circuit Court for Baltimore County several times for matters in connection with this case. It appears that at these times he was in federal custody in New York, and upon completion of the hearings on motions and other matters, he was returned to New York by the federal authorities. As this motion was heard by the court on argument without any testimony being taken, the record is not entirely clear. Nevertheless, we glean that whenever it was necessary to have Grandison in attendance at court for matters connected to this case a writ of *habeas corpus ad prosequendum* was obtained and served. Thereupon federal marshals escorted Grandison to court and stayed with him until the court business was completed. Grandison was then escorted back to New York by the federal marshal, where he was being held in a pre-trial detention facility. It also appears that during this period Grandison was not serving a period of incarceration, only pre-trial detention. The trial judge concluded that he was not satisfied that Grandison was "serving a sentence in the Federal Court," that no detainer was filed, and that Grandison never left the custody of the federal marshal. Article 27, § 616E[a][1][10] contains certain triggering events which, as argued by the State, were not met here. First, there needs to be a detainer which was lodged against Grandison. While the record is less than clear as to what was filed, the trial judge found that it fell short of being a detainer. Second, there is doubt that the requirement in § 616E[a] that Grandison was serving a term of incarceration was met; the trial judge did not think so. Finally, § 616E[a] requires that custody be obtained by the State. It was not here, as noted by the trial judge. We do not believe the trial judge erred; he heard the argument and saw what was presented to him. We find no merit to this contention.

VII

Denial of Request for Further Removal

[18] Because of what he perceived as extensive publicity surrounding his case, Grandison requested an additional removal; lacking this, he wanted a continuance; and in the absence of either, he moved to have the jury sequestered. He also sought the impaneling of a new group of jurors. The trial judge denied all of these requests. Grandison now complains that he was de-

10. That section states:

"(a) *Presentation of request.*—The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have the prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V(a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request: and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability either upon his own motion or upon motion of the prisoner.

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for Further Removal

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nied a fair trial. We disagree. In *Evans v. State*, 304 Md. 487, 499 A.2d 1261 (1985), we had occasion to address this identical issue when Evans raised it in the Circuit Court for Worcester County where he was being tried. The reasons cited by Evans are the same, basically, as those cited by Grandison. What Judge Eldridge wrote for the Court there is equally applicable to Grandison's argument here and is dispositive of his contention. Judge Eldridge stated in part:

> "We hold that the record supports the decision of the trial judge to deny the request for further removal. We have consistently taken the position that this question is one which rests within the trial court's discretion, reviewable on appeal only to determine whether there has been an abuse of discretion."

Id. at 511-12, 499 A.2d at 1273-74 (citations omitted).

Accordingly, we herein conclude that the denial of the request for further removal did not amount to an abuse of discretion under Maryland law.

The same can be said of the trial court's denial of a continuance. It is beyond dispute that the determination of whether to grant a continuance lies within the sound discretion of the trial court. *Id.* at 514, 499 A.2d at 1275. Here, we find no evidence of abuse of that discretion.

[19] Similarly, the determination to have the jury sequestered throughout the trial is discretionary. Former Md.Rule 751 e (now Md.Rule 4-311(e)), Maryland Code (1974, 1984 Repl.Vol.), Courts and Judicial Proceedings Article, § 8-304; *see Evans*, 304 Md. 487, 499 A.2d 1261 (1985). Here, too, Grandison has failed to provide us with any indication that there was an abuse of discretion. There is no proof of juror prejudice. To the contrary, the jurors received daily admonitions against exposure to publicity.

11. Former Md.Rule 752 provided:

> "The court may permit the parties to conduct an examination of prospective jurors or may itself conduct the examination. In the latter case, the court shall permit the parties to supplement the examination

[20] Finally, Grandison's contention that a new jury should have been impaneled due to alleged discussions connecting him to the Mafia is completely without merit and foundation in the record. Any possibility of prejudice resulting from those rumors was adequately cured by the trial court's individual questioning of the prospective jurors. Consequently, there was no abuse of the trial court's discretion here.

VIII

Individual Voir Dire

[21] In assessing appellant's contention that the trial judge's voir dire examination of the jury *en masse* was inadequate to protect him from the probability that his defense would be prejudiced due to publicity surrounding the Evans verdict, we begin with the recognized principle that "in the absence of a statute or court rule to the contrary, as long as the selection [process] [of a jury] results in a fair and impartial jury, the method and manner of conducting a voir dire rests within the sound discretion of the trial court." *Evans v. State*, 304 Md. 487, 514, 499 A.2d 1261, 1275 (1985) (quoting *Colvin v. State*, 299 Md. [illegible], 472 A.2d 953, 960, *cert. denied* — U.S. —, 105 S.Ct. 226, 83 L.Ed.2d [illegible] (1984)).

At issue here is whether the trial judge abused his discretion as appellant contends in failing to grant appellant's request to *individually* voir dire members of the jury panel as to potential prejudice resulting from the guilty verdict rendered in the Evans trial, which was held in nearby Worcester County.

Appellant has offered no authority, nor has our research uncovered any, mandating that a trial court conduct individual voir dire of each member of the jury after trial has commenced in a capital case where there is an allegation of jury prejudice resulting from publicity of a related, yet separate, trial.[11]

Nonetheless, several related principles of law exist which in our analysis force us to conclude that appellant's argument must fail.

To support his contention, appellant relies in part on *Silverthorne v. United States*, 400 F.2d 627 (9th Cir.1968), *cert. denied*, 400 U.S. 1022, 91 S.Ct. 585, 27 L.Ed.2d 633 (1971), for the proposition that in some instances where a significant potential for prejudice has been found, individual voir dire of the jurors is *required*. We decline to analyze the merits of such a contention as we find the case *sub judice* factually distinguishable to *Silverthorne*.

In *Silverthorne* the appellant argued that the trial court committed reversible error in failing to ascertain during voir dire and at certain specific points in the trial whether, in light of the *massive* news media publicity which antedated and which was contemporaneous with the trial, the jurors bore any prejudice toward appellant. 400 F.2d at 630. In analyzing the particular situation, the United States Court of Appeals noted that during the trial some jurors, while sitting in the jury room, read the newspaper accounts of appellant's trial; indeed, one particular juror maintained a comprehensive collection of newspaper articles pertaining to appellant's trial. *Id.* at 641. Though these facts were brought to the attention of the trial judge during the trial, he nonetheless failed to inquire as to the possible influence of the articles or further attempt to remedy the situation.

In holding that the trial court erred, the Circuit Court of Appeals stated, "[W]e have no recourse, in light of this incident, but to ... attribute little if any weight to the court's repetitive admonitions that the jurors should read or hear nothing about the case." *Id.* at 641. Relying in part on *Coppedge v. United States*, 106 U.S.App.D.C. 275, 272 F.2d 504, 508 (1959), *cert. denied*, 368 U.S. 855, 82 S.Ct. 92, 7 L.Ed.2d 52 (1961), the court noted, "It is ... the affirmative duty of the trial court to take positive action to ascertain the existence of improper influences on the jurors' deliberative qualifications and to take whatever steps are necessary to diminish or eradicate such improprieties." *Silverthorne*, 400 F.2d at 643.

We find the significant fact existing in *Silverthorne*, knowledge on the part of the trial court of blatant violations by members of the jury of the trial court's admonitions, not to be present in the case at bar. Further, in the case at bar, there is no evidence on record of *massive* publicity surrounding *appellant's* trial but only allegations of the existence of publicity surrounding the related but separate Evans trial.

In *Coppedge*, the United States Court of Appeals for the District of Columbia Circuit reversed the conviction of a criminal defendant on the basis that the trial court failed to ascertain the possible effect of trial publicity on members of the jury. Particularly, the trial court was found to have allowed the jury to twice separate overnight without admonishing the jurors against reading newspaper articles about the pending trial. Further, the trial court failed to inquire into the potential prejudice harbored by those jurors the trial court *knew* had read newspaper accounts of the proceedings. This was held to constitute error on the part of the trial court. In the case *sub judice*, the trial court specifically admonished the jurors not to expose themselves to media publicity; further, there is no evidence in the record that suggests the trial court had knowledge that any member or members of the jury had violated its admonition. *See also Adjmi v. United States*, 348 F.2d 654 (5th Cir.1965).

Turning to the instant appeal, it must be borne in mind that the record suggests the trial judge was extremely sensitive to and concerned with the potential problems raised by media publicity and was quite aware of the necessity of specifically calling to the attention of the jurors the impor-

by any further inquiry it deems proper or shall itself submit to the prospective jurors the said [illegible] questions proposed by the parties it deems proper." (Emphasis added)

tance of avoiding it. On the evening of May 2, 1984, the trial judge warned the newly selected jurors:

"Now, the admonishment I am going to give you now will be true throughout these proceedings. Please don't discuss this matter with anyone at all. Don't discuss it amongst yourselves, and don't discuss it with your friends or your neighbors or your wives or husbands, as the case may be, or your children, or with the press.

As I said a couple times before, I know when you are playing an important part in a proceeding like this, it is difficult sometimes to avoid reading a newspaper account of it or watching a television account of it or something like that. I know it is hard not to do that. But I am going to ask you, you are going to have to refrain from doing it in this case if you are going to be fair to both parties.

You are under oath to be fair to both parties. Don't watch any television account or listen to any radio account of these proceedings until this case is terminated. Don't read anything in the newspaper about it, please, until this case is terminated."

The next morning the trial judge reiterated the admonition. He again reminded the jurors during the course of the trial.

Additionally, on the morning of May 9, the morning after co-conspirator Evans was convicted in Worcester County, upon request of the appellant-Grandison, the trial judge posed the following question to the jury *en masse*:

"Have any of you heard anything about the outcome of a case that was concluded in Worcester County last night? If you have, please stand."

There was no response by any member of the jury.

[22] Based on our review of the record, we are not persuaded that the trial judge erred in questioning the jury *en masse* as to the alleged publicity surrounding the Evans trial.[12] Appellate courts should be slow to impute to juries a disregard of their duties and to trial courts a want of diligence or perspicacity in appraising the jury's conduct. *Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 53 S.Ct. 252, 77 L.Ed. 439 (1933). It is mere speculation, unsupported by the record, to conclude that there were jurors who became overwhelmingly influenced by publicity surrounding a different trial and yet did not choose to acknowledge these feelings before their fellow jurors. Manifestly, Grandison has not demonstrated that he has been afforded anything less than a fair and impartial jury.

Under the circumstances presented by the instant case, we are not persuaded that the trial judge erred in conducting the requested voir dire concerning publicity surrounding the Evans conviction *en masse*.

IX

Exclusion for Cause of Jury Panel Members Who Expressed General Objections to the Death Penalty

[23] Grandison next contends that of the twenty six prospective jurors who expressed some hesitation about imposing the death penalty all but three were excused for cause. He argues that it is clear that the court improperly struck these jurors because their beliefs were not such as to prevent them from rendering an impartial verdict. The State, on the other hand, contends there was no error by the trial judge. We have carefully reviewed the record and agree with the State's position.

The Court has recently been confronted with two death penalty cases in which the same basic argument was made as is now presented by Grandison; in both cases we rejected that argument and do so here. See *Foster v. State*, 304 Md. 439, 499 A.2d 1171, 3 L.Ed.2d 1250 (1959).

12. Each case must rest on its "special facts." *Marshall v. United States*, 360 U.S. 310, 79 S.Ct.

1236 (1985) and *Evans v. State*, 304 Md 487, 499 A.2d 1261 (1985). The only variation in Grandison's argument stems from *Wainwright v. Witt*, 469 U.S. —, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), wherein the Supreme Court modified the standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment.[13] The Court stated, "That standard is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'" *Id.*, — U.S. at —, 105 S.Ct. at 852, 83 L.Ed.2d at 851-52 (quoting *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)). After reviewing the record we are satisfied that where the trial judge excused a prospective juror for cause he followed the standard set out in *Witt*. In reaching this conclusion we recognize that deference must be given to the trial judge's decision to exclude. In *Witt*, in pertinent part, the Supreme Court stated:

> "We note that, in addition to dispensing with Witherspoon's reference to 'automatic' decisionmaking, this standard likewise does not require that a juror's bias be proved with 'unmistakable clarity.' This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made 'unmistakably clear'; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. For reasons that will be developed more fully infra, this is why deference must be paid to the trial judge who sees and hears the juror." — U.S. at —, 105 S.Ct. at 852-53, 83 L.Ed.2d at 852-53 (footnote omitted).

In our view, Judge Simpkins was painstakingly thorough in the questioning of prospective jurors, particularly those who obviously had problems with the death penalty in general. Furthermore, the trial judge afforded Grandison, his standby attorney, and the State's attorney ample opportunity to question the prospective jurors. In short, we are satisfied that the entire procedure was carefully executed in an effort to obtain a fair and impartial jury both as to the defendant and to the State.

X

Failure to Strike for Cause Juror Who Indicated Potential Inability to be Impartial

[24] Grandison also argues that the trial judge erred in refusing to strike for cause six prospective jurors whose ability to be impartial was "drawn into serious question" because of their aversion to drugs and drug trafficking.

A defendant is of course entitled to a fair and impartial jury. What Grandison overlooks, however, is the fact that all six of the prospective jurors he claims should have been struck were rehabilitated through additional questioning. For example, Mrs. Creasy, who admitted she had heard the case was a drug-related case also stated several times she thought she could base her decision on the evidence she heard in the courtroom and the law involved. Mrs. Dorsey disliked drugs; she was asked the following question by Grandison's standby counsel:

> "MR. CRAWFORD: Could I ask you one more question? I am sorry. Getting back to this drug business, if some-

13. *See also Darden v. Wainwright*, 767 F.2d 752 (11th Cir.1985), *cert. granted*, — U.S. —, 106 S.Ct. 21, 87 L.Ed.2d 699 (1985), argued January 13, 1986.

thing came out in trial to indicate that there were drugs involved, and although this man is not on trial for any drug involvement, if it should develop during the course of the trial that there may have been some drug involvement, although he is not on trial for that, would that have any—make any difference to you as to how you arrived at a verdict regarding what he is on trial for?"

MRS. DORSEY: No, if it wasn't pertinent to the case. Like I said, I just don't like drugs. I had an experience in drugs with my son, and he is well, thank God. I just don't like drugs."

Thus it is clear that Mrs. Dorsey was stating, in effect, that the drug factor would make no difference in how she arrived at a verdict if the case did not involve drug charges. Mrs. Hankins also stated that she would try her very best to make a decision based on the evidence and the law. Mrs. Somers stated she would not make a decision on the fact of drugs alone and that her decision would be based on the evidence and the law. Finally, both Mr. Brimer and Mr. Serman testified that while drugs might influence them, they would follow the court's instructions to base their decisions on the evidence and the law. Thus while unremarkably all expressed an aversion to drugs, all stated they would make a decision based on the evidence and the law. In our view Grandison was entitled to no more.

XI

Death Qualified Jury

Grandison next contends that he was entitled to be tried by a jury from which opponents to the death penalty were not excluded. We recently had occasion to address this contention in *Foster v. State*, 304 Md. 439, 499 A.2d 1236 (1985). For the reasons set forth in Part IB of the *Foster* opinion, 304 Md. at 453, 499 A.2d at 1243, we again reject this contention.

XII

Evidence

Here, certain evidence is argued to have been erroneously admitted at trial. That evidence consists of, namely: (a) testimony of Cheryl Piechowicz concerning her husband and sister, (b) photographs of the victims taken before the incident occurred, (c) photographs taken at the autopsy of each victim, (d) testimony of Cheryl concerning her conversation with Janet Moore, (e) a MAC-11 pistol, and (f) an enlargement of Grandison's March 14 letter to Moore.

(a)

[25] During the guilt or innocence phase of the trial, Cheryl Piechowicz testified, *inter alia*, to certain facts about her sister and husband.[14] Objection to this testimony on the grounds of relevancy was overruled. We perceive no error on the part of the trial judge in so ruling.

In *Johnson v. State*, 292 Md. 405, 439 A.2d 542, 556 (1982), holding that the trial judge did not err in permitting testimony that the victim had a very sick daughter, we stated:

"Assuming, solely arguendo, that this testimony was superfluous to the prosecution's case, a reversal of the underlying convictions is not justified if the evidentiary violation constitutes harmless error. The standard for determining harmless error, as thoughtfully laid out by Judge O'Donnell for this Court in *Dorsey v. State*, 276 Md. 638, 659, 350 A.2d 665, 678 (1976), is whether 'a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict.' Upon such a review of the trial record in this case we have no difficulty in declaring beyond a reasonable doubt that the verdicts were not influenced by

14. Generally, that her relationship with her sister, Susan, was perfect; that her sister was a good student, sports-oriented, and engaged to be married. She also testified she was deeply in love with her husband, Scott.

the testimony concerning the daughter's health. The record is glutted with overwhelming evidence in support of the jury's guilt determinations.... A reversal on this basis is thus not warranted."

We find these principles applicable here and dispositive of this contention.

(b) & (c)

[26] During Cheryl's testimony, two color photographs were introduced; one, a high school portrait of Susan Kennedy (State's Exhibit # 1), the other, the Piechowiczes at the beach (State's Exhibit # 2).[15] Whether a photograph is of practical value in a case and admissible at trial is a matter best left to the sound discretion of the trial judge. *Johnson* v. *State*, 303 Md. 487, 502, 495 A.2d 1, 8, *cert. denied*, — U.S. —, 106 S.Ct. 868, 88 L.Ed.2d 907 (1985). Ordinarily a court's determination as to the admissibility at trial of photographs will not be disturbed unless plainly arbitrary. *See Bowers* v. *State*, 298 Md. 115, 135–36, 468 A.2d 101, 111–12 (1983).

Considering first the photographs identified as State's Exhibits 1 and 2, we perceive no arbitrariness on the part of the trial court in ruling those exhibits admissible. The photograph of Kennedy was relevant to illustrate the similarity the victim bore to her sister, Cheryl Piechowicz. As to the family photograph of the Piechowiczes, we fail to see any prejudicial error in admitting it, particularly in light of the overwhelming evidence against the accused.

[27] Two black and white photographs, one of each victim, marked State's Exhibits 23 and 24, are also contested as erroneously admitted. The photographs were taken in connection with the medical examiner's autopsy report on each victim. We conclude it was not error to admit these photographs.

Not only is the admissibility of such evidence clearly within the trial court's sound discretion, *Johnson*, 303 Md. at 503, 495 A.2d at 9,[16] but we have had occasion to recognize as proper the exercise of such discretion in receiving into evidence at trial photographs depicting the condition of the victim and location of injuries upon the deceased, *Clarke* v. *State*, 238 Md. 11, 21–22, 207 A.2d 456, 461–62 (1965) and the wounds of the victim, *Madison* v. *State*, 200 Md. 1, 7–8, 87 A.2d 593, 595 (1952).

Nor are the particular photographs inflammatory to the jury solely on the basis that they do not represent any issue in controversy. Further, since the photographs are mere graphic representations of undisputed facts already in evidence, their introduction could not be held to have injured the accused. *See, e.g., Smith* v. *State*, 182 Md. 176, 187, 32 A.2d 863, 867 (1943).

(d)

Cheryl Piechowicz testified over objection that she conversed with co-conspirator Moore at the federal courthouse on March 14, 1983, while appellant's federal drug trial was there pending. An objection to the substance of the conversation was sustained on grounds of hearsay. However, Cheryl was permitted to testify that a conversation had taken place and that Moore had "scared her." Also, Cheryl successfully identified a photograph of Moore. Al-

15. The family photograph pictured the daughter of Scott and Cheryl as well. Her image was blackened out by the court prior to its release to the jury.

16. *See also*, Maryland Code (1982), Health-General Article, § 5-311(d), which states:

"§ 5-311. *Records.*

(d) Evidence.—(1) In this subsection, "record":

(i) Means the result of a view or examination of or an autopsy on a body; and

(ii) Does not include a statement of a witness or other individual.

(2) A record of the office of the Chief Medical Examiner or any deputy medical examiner, if made by the medical examiner or by anyone under the medical examiner's direct supervision or control, or a certified transcript of that record, is competent evidence in any court in this State of the matters and facts contained in it."

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though not clear from his brief, appellant's argument seems to be that the admission of Cheryl's testimony concerning her conversation with Moore was erroneous since it had no relevance to the proceedings. We disagree.

[28, 29] As a preliminary matter, we note that appellant's contention that Cheryl's admitted testimony was irrelevant was not preserved for appeal, and is therefore waived. Where specific grounds are delineated for an objection, the one objecting will be held to those grounds and will ordinarily be deemed to have waived grounds not specified. *Thomas v. State*, 301 Md. 294, 328, 483 A.2d 6, 23 (1984). Since Grandison specifically objected to the testimony on hearsay grounds at trial, our review is limited to that issue.

[30] Despite the fact that the trial judge sustained Grandison's hearsay objection, the court maintained discretion to allow introduction of evidence as to the existence of the Moore conversation and its effect on Cheryl. A trial judge has broad discretion to determine whether evidence will be sufficiently helpful to the jury to justify an excursion into the subject. *Stebbing v. State*, 299 Md. 331, 350, 473 A.2d 903, 912, *cert. denied*, — U.S. —, 105 S.Ct. 276, 83 L.Ed.2d 212 (1984). Here, Moore was alleged to be part of the conspiracy; Cheryl's testimony was relevant to illustrate that Moore acted in a manner supportive of Grandison at the time of the federal hearings to frighten a crucial identification witness.

(e)

[31] The trial court similarly did not err in admitting State's Exhibit 14, a MAC-11 pistol, into evidence.

Testimony adduced at trial revealed that State's Exhibit 14 looked like the weapon that changed hands between Kelly and Evans and was seen by Charlene Sparrow. Additionally, a weapons expert concluded at trial that the pistol he identified as a MAC-11 was the only type of firearm that could have discharged the bullets and ejected the particular cartridges found at the scene. Finally, the jury was told that the actual weapon that fired the fatal shots had never been found.

In light of this testimony, we perceive no error in the admission of State's Exhibit 14. We were presented with this precise issue in *Evans v. State*. Our discussion there is dispositive of Grandison's present argument. Citing C. McCormick, Evidence § 213 (3d ed. 1984), at 670, we held that the trial judge did not commit an abuse of discretion in admitting into evidence a MAC-11 machine pistol as a weapon representative of that allegedly used in the slaying. *Evans*, 304 Md. at 520-21, 499 A.2d at 1278. In the case *sub judice*, not only was the proffered exhibit relevant and material, it was clearly an important part of the State's case in its attempt to link the weapon offered to Evans on the day prior to the murders to the weapon used to commit the murders. Thus, we conclude the trial judge did not err in admitting State's Exhibit 14 as there was ample evidence of similarity between it and the weapon used.

(f)

[32] Finally, appellant argues that an enlarged facsimile (State's Exhibit 45) of an original letter (State's Exhibit 44) written by appellant to Moore, dated March 14, 1983, had the prejudicial effect of overemphasizing a single piece of evidence over all others. We cannot agree.

The enlargement of the letter was identified and received into evidence during direct examination of Mr. Senter, a document examiner for the F.B.I. Though unclear from the record, appellant seemed to object to the display of the enlargement since it was shown to the jury prior to its admission into evidence. Whether the display overemphasized that piece of evidence was not questioned by appellant at trial. *See Thomas*, 301 Md. 294, 483 A.2d 6.

Nevertheless, we find no error on the part of the trial court in allowing State's Exhibit 45 to be admitted, nor do we feel the appellant was prejudiced by the display

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of the office of the Chief Medi- or any deputy medical exam- by the medical examiner or by r the medical examiner's direct or control, or a certified tran- record, is competent evidence in this State of the matters and ed in it."

of that exhibit prior to its formal admission into evidence. First, the original letter was already in evidence; its admissibility was not challenged on appeal. Second, testimony revealed that the enlargement was an exact, although enlarged, copy of the original. Finally, the enlargement was employed to demonstrate to the jury the basis for witness Senter's conclusion that the original letter was indeed authored, drafted, and signed by Grandison.

In analyzing such evidence, it is the statement itself which has substantive legal significance. The means by which the statement is recreated as evidence before the jury is of secondary import, provided that its authenticity is reasonably assured. *Colbert v. State*, 37 Md.App. 383, 387, 377 A.2d 585, 588 (1977). Accordingly, we hold there was no error in the display or the admission of State's Exhibit 45.

XIII

Admission of Hearsay Evidence Under The Co-conspirator Exception

Grandison next argues that the trial judge erred in allowing the admission of hearsay evidence under the co-conspirator exception to the hearsay rule. This is so, he argues, because the State had not proven the existence of a conspiracy by independent proof showing his participation therein. Furthermore, he argues that several of the statements related to matters not within the scope of the conspiracy and several statements were made by someone not alleged to be part of a conspiracy. After reviewing the record we perceive no merit to Grandison's contentions.

Grandison concedes that out of court declarations of one conspirator made during the course of and in furtherance of the conspiracy are admissible against a co-conspirator as an exception to the hearsay rule. *See Greenwald v. State*, 221 Md. 245, 157 A.2d 119, *appeal dismissed*, 363 U.S. 721, 80 S.Ct. 1599, 4 L.Ed.2d 1521 (1960). What Grandison seems to argue is that before this hearsay exception is available, there must be a prima facie showing of the existence of a conspiracy and his participation therein.

[33] To the contrary, it is not necessary that a conspiracy be conclusively established *before* the declarations are admissible. Flexibility in the order of proof is allowed. *Greenwald*, 221 Md. at 257, 157 A.2d at 126; *see Hill v. State*, 231 Md. 458, 461, 190 A.2d 795, 796, *cert. denied*, 375 U.S. 861, 84 S.Ct. 127, 11 L.Ed.2d 87 (1963); *Mason, Taylor and Taylor v. State*, 18 Md.App. 130, 137, 305 A.2d 492, 497 (1973).

[34] In the instant case, we have reviewed the record and are persuaded that there was ample evidence presented, independent of the challenged hearsay statements, of the existence of a conspiracy to justify the trial court's application of this hearsay exception. For example, Grandison's letter of March 14 to Janet Moore telling her to take "Short" (Evans) to see Rodney (Kelly) to take care of something to do with his upcoming trial; the evidence of Evans' and Moore's visit thereafter with Grandison in the City Jail; and Theresa Purdie's testimony that Evans, Moore, and Kelly all spoke to Grandison over her phone about protective glass at a motel. In addition, Calvin Harper testified that Kelly took a gun to show to Evans and the next day Kelly left with the gun and returned without it. There was also testimony to the effect that Kelly got $500.00 from a Michael Queen, which apparently was used to obtain the gun.

It is settled that not much in the way of independent evidence is needed to show the existence of a conspiracy and accused's involvement therein. *See Brown v. State*, 281 Md. 241, 378 A.2d 1104 (1977). In our view the independent evidence in this case was sufficient.

Finally, Grandison contends that there was one instance of double hearsay which did not fall within the co-conspirator exception and that another statement could not be said to be in furtherance of the conspiracy. Furthermore, he complains that one

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statement that Grandison told Purdie—she should deny knowing Charlene Sparrow—was made after the conspiracy had ended. We find no merit in these contentions.

XI[17]

Reference to Federal Case

[35] Appellant also objected to the introduction of evidence relating to a federal charge against him pending at the time of commission of the homicides in the case *sub judice*. The admissibility of this evidence forms the basis for Grandison's next argument.

The State maintains that evidence of appellant's pending federal charge was relevant to show his motive for arranging the murders and thus admissible. We agree.

The record reveals that at no time during the proceedings below did the State reveal or attempt to reveal the nature of the pending federal charge against the appellant, its result, or details related to it. The references made to the federal charge only stated that there existed a federal charge against Grandison for which the prosecution had to prove he occupied a particular room at the Warren House Motor Hotel in November of 1982.

It is elementary that evidence of a defendant's prior criminal acts may not be introduced to prove that he is guilty of the offense for which he is on trial. *Straughn v. State*, 297 Md. 329, 333, 465 A.2d 1166, 1169 (1983). We applied this rule, commonly referred to as the "other crimes rule," in *Ross v. State*, 276 Md. 664, 669, 350 A.2d 680, 684 (1976), where we said:

"[E]vidence which in any manner shows or tends to show that the accused has committed another crime wholly independent of that for which he is on trial, even though it be a crime of the same type, is irrelevant and inadmissible." (Citations omitted).

However, the exceptions to this rule are equally well-recognized and virtually as prominent as the rule itself. *McKnight v. State*, 280 Md. 604, 613, 375 A.2d 551, 556 (1977).[17] *See* C. McCormick, Evidence § 190 (3d ed.1984). The admissibility of the challenged evidence must be determined through recognition of this rule and, more particularly, application of its exceptions.

We conclude that the scintilla of evidence admitted relating to appellant's federal charge was relevant to establish appellant's motive for arranging the murders. Thus, the evidence does not fall prey to the rule of exclusion enunciated above. As our cases make clear, that rule will act as a bar to other crimes evidence *unless* the evidence is "substantially relevant for *some other purpose* than to show a probability that [the accused] committed the crime on trial because he is a man of criminal character." *Ross*, 276 Md. at 669, 350 A.2d at 684 (quoting McCormick, *supra*) (emphasis supplied).

Thus, the trial court did not err. *See Straughn*, 297 Md. at 333–34, 465 A.2d at 1169 (trial court has broad discretion in admitting other crimes evidence). McCormick, *supra*. Evidence of the *existence* of appellant's pending federal charge was relevant to illustrate his motive for arranging the murders; it demonstrated a logical connection between the crucial defense witnesses, the Piechowiczes, and the subsequent homicides. Further, the fact that the State proffered no evidence *other than* the existence of the pending federal charge renders any potential prejudice to Grandison minimal in light of its probative value. 297 Md. at 333–34, 465 A.2d at 1169.

17. Evidence of other crimes is independently relevant and thus admissible if introduced to prove or establish:

"(1) motive, (2) intent, (3) absence of mistake, (4) a common scheme or plan embracing the commission of two or more crimes so related to each other that proof of one tends to establish the other, and (5) the identity of the person charged with the commission of a crime on trial."

Ross, 276 Md. at 669–70, 350 A.2d at 684 (citations omitted).

XV

Erroneous Admission of Hearsay Evidence Resulting in Prejudice

[36] During the State's case-in-chief, one James Savage, the prosecutor in the federal drug trial against Grandison, was permitted to testify that Scott Piechowicz had provided the federal authorities certain evidence against Grandison. The tenor of this evidence was to show that despite the fact that Piechowicz could not make a positive identification of Grandison, he could help establish that Grandison had occupied a room at the Warren Motel at a time critical to the federal prosecution. Piechowicz had related to Savage that he had seen a ticket on an individual's belt indicating that the individual had been to the Sugar Ray Leonard benefit. Apparently, this ticket was found in the room occupied by Grandison.

We find no error in the trial court's refusal to preclude Savage, testifying as a State witness, from relating this evidence. Grandison complained at the instant trial that his right of confrontation was violated and the evidence was hearsay. This argument is meritless. Hearsay was not involved as these extrajudicial statements were not being offered for their truth. *Lunsford v. Bd. of Education of Prince George's County*, 280 Md. 665, 374 A.2d 1162 (1977); *McCall's Ferry Co. v. Price*, 108 Md. 96, 69 A. 832 (1908); *Sun Cab Co. v. Walston*, 15 Md.App. 113, 289 A.2d 804 (1972), *aff'd on other grounds*, 267 Md. 559, 298 A.2d 391 (1973). Through Savage, the State sought to establish a motive for the murder of Scott Piechowicz. Thus, the veracity of Piechowicz's statements to Savage was of no import. The mere fact that they were made supplied a motive for the Piechowicz killing. At the instant trial, Savage was under oath and available for cross-examination as to whether Piechowicz actually made the statements. Hence, his testimony was admissible.

A second ground for complaint arose when the State, in cross-examining Detective Duckworth, elicited certain alleged hearsay not within any of the recognized exceptions to the rule. Duckworth, an investigating officer in the murder case, had been called by the defense to show that Scott Piechowicz had been summoned to testify in an unrelated case. Through this testimony the defense hoped to show that someone else besides Grandison had a motive to murder Scott Piechowicz. Grandison elicited this testimony from Duckworth on direct examination without objection by the State.

On cross-examination the State sought to establish the nature of the dispute precipitating the second summons. Without objection, Detective Duckworth testified that his investigation of the summons had revealed that Piechowicz and one Eric Allen had disagreed over the amount of money Allen owed for a room at the Warren House. This line of questioning proceeded until Duckworth was asked if he had interviewed Mr. Allen. At this point, Grandison objected stating, "All this is hearsay."

This objection was properly overruled because quite simply the question to which the hearsay objection was directed was not one involving hearsay. Duckworth knew of his own knowledge whether he had interviewed Mr. Allen. Thus, the question was clearly proper. Further, this line of inquiry had been initiated by Grandison, and the State was certainly privileged to develop the issue on cross-examination. *See Culler v. Standard Oil Co.*, 127 Md. 405, 96 A. 558 (1916); *see also Walters v. State*, 156 Md. 240, 144 A. 252 (1929); *Koogle v. Cline*, 110 Md. 587, 73 A. 672 (1909).

[37] The final testimonial complaint occurred when appellant recalled James Savage to testify that a person named Anthony Garrison had registered for the hotel room at issue in the federal trial and that Garrison and Grandison were different people. On cross-examination the State pursued this line of questioning over objection and elicited certain testimony which Grandison now contends was sufficiently prejudicial to warrant reversal of his conviction. Spe-

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cifically, the State established that al-
though Anthony Garrison registered for
the room, it was Anthony Grandison who
occupied it. Further, the federal prosecu-
tor testified over objection that Grandison
requested Garrison register for the room
and paid him for doing so. He also ex-
plained that a showing that Grandison was
connected with a particular room at the
Warren House Hotel was crucial to convict
Grandison on federal drug charges.

The admission of this testimony does not
warrant reversal. A review of the record
shows that each of these facts, with the
exception of the fact that Garrison received
remuneration for registering for the room,
was independently established through
unobjected to testimony. For instance,
Cheryl Piechowicz testified that she had
been summoned to appear as a witness in
the federal drug trial of Anthony Grandi-
son to make an identification of Grandison
as an occupant of a room at the Warren
House. In addition, Savage when called as
a State's witness stated that the testimony
of Scott and Cheryl Piechowicz linking
Grandison to a certain room in the Warren
House was critical to the federal drug case.
Also, in the very colloquy of which Grandi-
son now complains, Savage was permitted
to testify, "Mr. Garrison requested the
room; Mr. Grandison occupied the room"
without objection or a motion to strike by
the defense. Finally, on redirect examina-
tion by Mr. Grandison, Savage testified
that Grandison had a key to the hotel room
in his possession when he was arrested on
the federal drug charge.

Thus, the only fact established over ob-
jection by the complained of testimony was
that Garrison was paid by Grandison for
registering for the hotel room at issue in
the federal drug trial. In light of the col-
lateral nature of this evidence, we fail to
see how its admission prejudiced Grandi-
son. Consequently, we find no reversible
error.

18. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct.
160, 27 L.Ed.2d 162 (1970).

XVI

Denial of Request to Interview Potential Witness

Grandison also challenges the propriety of the trial court's refusal to allow him to personally interview a potential defense witness, Rodney Kelly.

Like Grandison, Kelly was considered a substantial security risk. He had already entered an *Alford*[18] plea to the crime of conspiracy to murder Scott Piechowicz and Susan Kennedy. As a result of his plea, Kelly had received a state sentence of fifty years. He also had received a federal life sentence for the same acts. At the time of the Grandison trial, Kelly was incarcerated in federal prison in Lewisburg, Pennsylvania. While in confinement he had allegedly committed another murder, and those charges were pending.

At the onset it must be noted that the court did not unequivocally deny the defense access to the potential witness. The trial judge offered to make Kelly available if the defense wanted to interview him through standby counsel. Grandison, however, declined to avail himself of this opportunity.

The propriety of the trial court's ruling denying Grandison personal contact with the prospective defense witness raises a question not heretofore dispositively addressed by this Court. However, dicta in *Kardy v. Shook*, 237 Md. 524, 541, 207 A.2d 83, 92 (1965), indicates that a defendant and his counsel are at perfect liberty to interview and interrogate prospective witnesses, subject to the witnesses' acquiescence in such interrogations.

The Court of Special Appeals has twice discussed this issue. In *Barnett v. State*, 8 Md.App. 35, 42, 257 A.2d 466, 470 (1969), the intermediate appellate court noted that there are no property rights in witnesses; each party may interview the other's witnesses to ascertain facts within that witness' knowledge. Subsequently, that court suggested that under certain circumstances

the denial of a defense request to interview a prospective witness would not entitle the defendant to a mistrial. *Johnson v. State*, 18 Md.App. 571, 576, 308 A.2d 426, 429 (1973).

[38] It is our opinion that the circumstances under which a defendant can conduct a pretrial interview of a prospective witness are a matter best left to the trial court's discretion. Here, we find no abuse of that discretion. In the instant case we are not confronted with a complete denial of an opportunity to ascertain facts within the potential witness' knowledge. To the contrary, Grandison was at perfect liberty to do so through standby counsel. Further, he was not compelled to prepare his defense without prior knowledge of the potential significance and thrust of Kelly's testimony. The two men had had substantial contact throughout the earlier federal proceedings.

[39] In effect, the trial court placed a condition on the interview—a condition with which Grandison was not willing to comply. Other jurisdictions vary on the propriety of such conditions. *See* Annot., 14 A.L.R.3d 652 (1967). The better view is to permit the trial judge to place certain limitations and restrictions on a party's access to potential witnesses if in the court's discretion such restrictions are reasonably necessary for the protection of the witness or for security purposes. *See State v. Gress*, 210 Kan. 850, 504 P.2d 256 (1972); *Commonwealth v. Balliro*, 349 Mass. 505, 209 N.E.2d 308 (1965); *State v. Balsavich*, 113 N.H. 53, 300 A.2d 521 (1973); *Holladay v. State*, 130 Tex.Cr. 591, 95 S.W.2d 119 (1936).

[40] Under the circumstances of this case, we find Judge Simpkins' ruling was reasonable. Clearly, the trial court's apprehension over allowing these co-conspirators to confer in private was well-founded. Both men were in custody and considered extremely dangerous. To maintain security, the trial judge requested the interview be conducted through standby counsel. It was the decision of Mr. Grandison not to do so. Hence, no interview of Kelly was ever conducted. In fact Kelly was never called as a witness for reasons discussed at section XVII, *infra*, which have nothing to do with this alleged denial of a pretrial interview.

Furthermore, Grandison was not prejudiced by the trial court's refusal to allow him direct contact with Kelly. By Grandison's own admission, Kelly had been in his presence throughout the federal trial. Consequently, he had ample opportunity to ascertain the tenor of Kelly's potential testimony. Moreover, Grandison never proffered the contents of the testimony to be elicited from Kelly. In light of these factors, no showing of prejudice has been made. Thus this Court cannot now say that the trial judge's refusal to grant Grandison the requested interview amounted to an abuse of discretion.

Accordingly, we find no reversible error here.

XVII

Admission of Evidence of an Alford Plea

[41] Grandison complains that the trial judge erred in ruling that if Rodney Kelly was called as a witness for the defense, the State would be allowed to cross-examine him on his *Alford*, *supra* note 18, plea for impeachment purposes. The plea was offered and apparently accepted to a charge of conspiracy. Grandison argues there was no admission of guilt, nor indeed a finding thereof.[19]

The State points out that there is nothing for us to review as Kelly did not testify, and no proffer was made of what his testimony would have been. We agree. In the

19. The State argues that indeed there was a finding of guilt. It is abundantly clear from the record that Kelly entered a guilty plea which was accepted. The proper acceptance of an *Alford* type guilty plea results in a valid conviction. *See Hudson v. State*, 286 Md. 569, 409 A.2d 692 (1979) and *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

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absence of a proffer, we are unable to determine whether this ruling prejudiced Grandison's case. As Judge Eldridge pointed out in his concurring opinion in *Johnson v. State*, 303 Md. 487, 495 A.2d 1, *cert. denied*, — U.S. —, 106 S.Ct. 868, 88 L.Ed.2d 907 (1985):

"Nevertheless, assuming that the issue can be preserved by a pre-trial motion, it is settled that whenever one is complaining about a trial court's refusal to admit certain testimony, it is necessary that there be a proffer of what the evidence would have been. *Mack v. State*, 300 Md. 583, 603, 479 A.2d 1344 (1984); *Hooters v. Kenneth B. Mumaw P. & H. Co.*, 271 Md. 565, 571, 318 A.2d 514 (1974); *Keys v. Keys*, 251 Md. 247, 250, 247 A.2d 282 (1968)."

At no time in the present case did Grandison make any proffer or make any showing on the record of the nature of the actual testimony which he desired to elicit from Kelly. Accordingly, there is nothing for us to review.

XVIII

Grand Jury Testimony of Gwen Farmer

Next at issue is whether the appellant was denied a fair trial because the trial court refused to either admit the grand jury testimony of Gwen Farmer or grant a postponement to allow the defense to locate her. We are unable to conclude that the trial court erred under the facts herein presented.

At the outset we note that the transcript of the grand jury testimony was not marked for identification and does not appear in the record. A portion of it, however, was read to the trial court outside the hearing of the jury.

Farmer had testified before the Federal Grand Jury on May 20, 1983 that Kelly had not driven her car on the night of April 28, 1983. She testified that she had had her car at work during the day and at approximately 5:00 had gone to Kelly's mother's house. Appellant proffered that Farmer would testify consistently with her grand jury testimony and contradict the State's witnesses on material points relating to the use of her car.

Appellant contends that Farmer's Federal Grand Jury testimony should have been admitted below since the testimony was relevant, given under oath, bore persuasive assurances of trustworthiness, and Farmer was unavailable.

The State, however, contends that the transcript of Farmer's testimony did not qualify for admission as former testimony since that testimony, given during an early, exploratory phase of the investigation, was not elicited with the same motivation that would attend cross-examination by the State prosecutor had Ms. Farmer testified at trial.

[42] The general rule surrounding the admissibility of former testimony requires that such testimony must have been given by a witness under oath, presently unavailable, and in a proceeding addressed to substantially the same issues as in the current proceeding. Further, there must have been reasonable opportunity and similar motivation on the prior occasion for cross-examination of the declarant by the party against whom the testimony is now being offered. *Crawford v. State*, 282 Md. 210, 214-15, 383 A.2d 1097, 1100 (1978). C. McCormick, Evidence § 255-258 (2d ed. 1972). See *Commonwealth v. Meech*, 380 Mass. 490, 403 N.E.2d 1174, 1177-78 (1980). Likewise, for former testimony to be admitted at a subsequent trial, there must exist a substantial identity of parties and issues. *Yellow Cab Co. v. Henderson*, 183 Md. 546, 556, 39 A.2d 546, 552 (1944).

[43] We do not believe the general rule is satisfied where, as here, Grandison offers the Federal Grand Jury testimony against the State in a subsequent independent criminal proceeding since the State was not a party to nor did it participate in

the federal proceedings [20] and thus was not in the position of a cross-examiner at the federal proceedings. Further, the United States' Attorneys, while investigating the matters of the Warren House, would not have been aware of all the facts that developed subsequent to that proceeding. They were in no position to examine Farmer to the extent they would have been able to had these facts been known to them, as they were to the State here.

In light of this and the absence of an opportunity for the State to cross-examine Farmer, the trial court did not abuse its discretion in refusing to admit her Federal Grand Jury testimony. In our view, this testimony lacked the persuasive assurances of trustworthiness essential to any hearsay exception.

[44] In addition, Grandison at trial sought to introduce Farmer's testimony under former Maryland Rule 740h 1(d).[21] The trial court responded, stating in part,

"Now, the whole thing boils down to whether [the transcript of the grand jury proceeding] is a deposition or not. It is not.

. . . . . .

As I understand the rule, it doesn't apply to this type of situation. I am going to deny your [Grandison's] motion."

The trial judge did not err. Former Rule 740 unequivocally refers to the admissibility and substantive use of depositions. Since the rule was clearly inapplicable it could not serve as the basis for the admission of the transcript of Farmer's Federal Grand Jury testimony.

[45] Finally, the trial court did not err in refusing to grant a continuance to appellant so as to allow appellant the opportunity to secure Farmer's presence for trial. The matter was within the trial court's discretion and will not be disturbed absent a showing of abuse prejudicial to the defendant. *Jackson v. State*, 288 Md. 191, 194, 416 A.2d 278, 281 (1980). In light of the fact that Farmer's presence could not be guaranteed by the appellant and since the case was otherwise ready for the jury, there was no pressing reason for the trial court to further delay submission of the case to the jury.

XIX

Failure to Disclose Exculpatory Information

This issue concerns a contention by Grandison that since he had made a pretrial request of the State for *Brady* [22] material in its possession, the trial judge erred in denying his motion to compel the State to turn over to him an FBI report made by an agent who was testifying. It appears that one Janet Bannister had given a statement to federal agents; Bannister was not called as a witness at trial. Grandison, through discovery proceedings in his federal trial, had obtained an edited copy of this statement. It was claimed that Bannister's statement contained exculpatory material in that she referred therein to seeing one Helen Kondilidis in the parking lot at the

20. Though Grandison, in his brief at trial below, alleges that Mr. Levitt, the State prosecutor, was present during Farmer's testimony before the Federal Grand Jury on September 19, 1983, he neither directs the Court's attention to nor are we able to find evidence in the record necessary to substantiate his allegation. Additionally, assuming *arguendo* that Levitt was indeed present at a federal proceeding, Grandison does not in any manner indicate that an opportunity to examine Farmer was afforded the State.

21. That rule states:

"*Rule 740. Depositions.*

h. *Use.*

1. Substantive Evidence.

At a hearing or trial a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if it appears: . . . (d) that the witness is absent from the hearing or trial and that the party offering his deposition has been unable to procure his attendance by summons or other reasonable means, unless the absence was procured by the party offering his deposition."

22. *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

motel at the time [illegible] testified she was in the motel lobby and saw Evans shortly before the murders. While there may be merit to Grandison's argument that this material was exculpatory, the agent stated he did not have a copy of the report or the statement. Furthermore, the State's Attorney told the court he did not then, nor did he ever, have this material.

There is no question but that Grandison was entitled to any exculpatory material in the hands of the State or under its control. *See* former Rule 741. However, as the trial judge stated, he could not order the State to turn over something it did not have. In so holding, we observe that Grandison had obtained an edited copy of Bannister's statement through his federal trial and thereby had more evidence than the State.

XX

The Request for Data Relevant for Proportionality Review

[46] In May of 1984, Grandison's standby counsel filed on his behalf a motion to compel the State to provide Grandison with certain information concerning "homicide statistics." The specific information was as follows:

"(1) The names of all defendants indicted for murder after July 1, 1978, in which aggravating circumstances, as defined in Article 27, Section 413 existed.

(2) As to each defendant so listed, indicate those cases in which the State elected to seek the death penalty.

(3) The disposition of each defendant's case, indicating if dispositions were the result of plea or trial.

(4) The full plea negotiations in those cases in which the State accepted a plea."

As the motion indicates, this information was being sought to support Grandison's motion to dismiss the State's election to seek the death penalty on the basis that such election was unconstitutionally random, arbitrary, and capricious. The trial judge denied the motion believing that the matter was to be dealt with by this Court under its statutorily mandated review of all death penalty cases. While the motion to dismiss appears to be based on allegations of an arbitrary election to seek the death penalty by the State, and there was some argument made to that effect when this present motion was heard, Grandison argues to us that he needed the information in order to prepare an argument on proportionality review. In our view he has abandoned the arbitrary election argument, and we need not address it.

As a practical matter, at the time of the request (after he had been found guilty but prior to his sentencing proceeding) the information sought for proportionality review purposes was not needed by Grandison. Indeed, that information would never be needed until the sentencing proceeding resulted in the imposition of a death sentence. See *Tichnell v. State*, 297 Md. 432, 468 A.2d 1 (1983) for a thorough discussion of the statutory proportionality review procedure required of this Court.

XXI

Motion to Dismiss for Violation of Federal Dual Prosecution Policy

In an apparent response to the concern expressed by the Supreme Court in *Petite v. United States*, 361 U.S. 529, 80 S.Ct. 450, 4 L.Ed.2d 490 (1960), over the fairness of multiple prosecutions, the Department of Justice established a policy precluding the initiation or continuation of a federal prosecution following a prior federal or state prosecution based on the same transaction unless there is a compelling interest supporting the subsequent prosecution. *See also Rinaldi v. United States*, 434 U.S. 22, 98 S.Ct. 81, 54 L.Ed.2d 207 (1977). Believing that the present state prosecution is based on the same transaction for which he was prosecuted in the federal courts, Grandison attempts to invoke the federal Department of Justice policy and contends his

due process rights have been violated. Without judging the merits of the policy we do not believe it has any relevancy in this state prosecution and thus find no merit to this contention.

XXII

Use of the Act Constituting the Offense as an Aggravating Factor

[47] Grandison argues, for the first time, that the finding that he entered into an agreement with Evans to have the Piechowiczs murdered for remuneration could not, standing alone, properly be relied upon to impose the death penalty. He argues that "the act of contracting was the crime itself, hence it could not also be an aggravating factor."

While this issue was not raised in the trial court and we need not address it (see Md. Rule 885), we shall do so in recognition of the seriousness of the case. In *Stebbing v. State*, 299 Md. 331, 358–361, 473 A.2d 903, *cert. denied*, — U.S. —, 105 S.Ct. 276, 83 L.Ed.2d 212 (1984), we had occasion to discuss a similar contention made in the context of using an underlying felony as an aggravating factor in a felony murder case in the capital sentencing phase. Judge Rodowsky stated for the Court:

"Maryland's capital punishment statute, Art. 27, §§ 412–414 makes plain the legislative intent that the commission of certain felonies, underlying a felony murder conviction, is to be considered an aggravating circumstance in the capital sentencing proceeding. At least 30 days prior to trial, the State must notify the accused of its intent to seek a sentence of death and must advise the accused 'of each aggravating circumstance' upon which it intends to rely. § 412(b). Section 413(c)(1) provides that the 'following type of evidence is admissible in [a sentencing] proceeding:

. . . .

(ii) Evidence relating to any aggravating circumstance listed in subsection (d) of which the State had notified the defendant pursuant to § 412(b).' "

Id. at 359–60, 473 A.2d at 917.

Section 413(d) lists the aggravating circumstances, of which the seventh is that "the defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration." In our view the same rationale used in *Stebbing* is applicable; the intent of the legislature is as clear in the instant case as it was in *Stebbing*. We reject Grandison's argument.

XXIII

Proportionality Review

[48] Grandison next assails his sentence of death on the basis that such sentence has not been given in any other case where the defendant had been convicted of contract murder (hiring someone else to commit the killing). In the only case of this nature where the State sought the death penalty, *Myers v. State*, 58 Md.App. 211, 472 A.2d 1027, *cert. denied*, 300 Md. 484, 479 A.2d 373 (1984), Myers was given a life sentence. In *Myers*, several mitigating factors were found to exist; Myers had not previously been found guilty of a crime of violence nor entered a plea of guilty or *nolo contendere* thereto; he acted under substantial duress, domination or provocation of another person; his capacity to appreciate the criminality of his conduct was substantially impaired; his act was not the sole proximate cause of the victim's death; it was found unlikely he would engage in further criminal activity; one co-defendant was given a life sentence and the other a grant of immunity. In the instant case only two mitigating factors were found. Grandison had no prior record of a conviction for a crime of violence, and he was not the sole proximate cause of the killings.

Other cases cited by Grandison are so sketchy that we do not find them helpful in trying to make a proportionality review.

23. Art. 27, § 413(d)(7).

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e a proportionality review.

What we said in *Evans*, *supra*, bears repeating here:

"The murders giving rise to this prosecution were as heinous as those in any case to come before us under the present capital punishment statute. No killings could have been more premeditated and deliberate than those here."

304 Md. at 539, 499 A.2d at 1288.

While we acknowledge that Grandison was not the "triggerman," but for him these murders would not have occurred. In our view Grandison is as culpable as Evans and it is clear the legislature intended that he be so found.

XXIV

Denial of Effective Assistance of Counsel at Sentencing

[49] On February 3, 1984, some two and one half months before trial, while the court was preparing to hear a motion filed by Grandison, the court observed that Grandison intended to represent himself. Accordingly, the court proceeded to conduct a hearing to satisfy itself that Grandison knew he had a right to counsel and was knowingly and voluntarily waiving that right. *See* former Md. Rule 723 c, now 4-215(b).[24] During the course of the colloquy with Grandison, the trial judge pointed out the advantages of having a lawyer to assist at trial and sentencing. Grandison advised the judge he understood, but that he had never waived his right to counsel; he stated he wanted standby counsel who the judge told him would be furnished. Being satisfied that Grandison understood his right to counsel and chose to represent himself, the court made a finding that Grandison had made an intelligent and intentional waiver of his right to an attorney. There the matter rested until after the guilt or innocence phase of the trial had passed. On May 28, 1984, the parties appeared in court for a hearing on Grandison's motion for a new trial and sentencing. It was brought to the trial judge's attention that Grandison and his standby counsel had agreed, after the guilty verdict, that standby counsel would handle the sentencing. Grandison maintained that he was entitled to change his mind about representation because the case actually was two separate trials. The trial judge disagreed with this contention. Nevertheless, because neither Grandison nor standby counsel was prepared to proceed to sentencing, the court allowed an eight day postponement, which was satisfactory to Grandison. Thereafter, a sentencing proceeding was had in front of a jury wherein Grandison himself produced witnesses and allocuted; the jury imposed the death penalty.

Grandison argues here that as the sentencing proceeding was a matter separate from the guilt or innocence proceeding, he was entitled to counsel. He recognizes that he had previously effectively waived counsel but contends that waiver did not prevent him from having counsel for sentencing under the rationale of *Faretta v. California*, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975). We find nothing in *Faretta* which supports Grandison's argument. That case stands for the principle that the State may not force an attorney on an accused who has knowingly and intelligently made a voluntary election to represent himself, which he has a right to do.

[50] Grandison also maintains that any prior waiver cannot be held to operate to deny him the right to counsel at a subsequent separate proceeding. He relies on former Md. Rule 723,[25] which he argues mandates readvisement (of right to counsel) at every separate proceeding; his reliance is misplaced. Section d 2 of Rule 723 provides:

24. Judge Simpkins, the trial judge, also noted that Judge Fader, of the Circuit Court for Baltimore County, had apparently previously gone over the same matter with Grandison.

25. Now Rule 4-215, effective after this trial

"If the defendant appears in court without counsel, at any proceeding after his appearance pursuant to section a of this Rule, the court may not proceed before determining whether the defendant at that time desires to waive counsel, *or has waived counsel, either affirmatively or by neglecting or refusing to obtain counsel.*" (emphasis added).

This language is clear and unambiguous; it states no prohibition to proceeding when there has been an affirmative waiver of counsel as here.

XXV

Admissibility of Victim Impact Statement

[51] We are here asked to reconsider our analysis in *Lodowski v. State*, 302 Md. 691, 490 A.2d 1228 (1985), *rev'd on other grounds*, — U.S. —, 106 S.Ct. 1452, 88 L.Ed.2d — (1986), of the admissibility of victim impact statements in death penalty cases; we decline to do so except in the context of the prohibition against *ex post facto* laws. *See* U.S. Constitution, art. 1, § 9; Md.Decl. of Rts., art. 17. Grandison argues that prior to July 1, 1983 the thrust of the law relating to victim impact statements was to compensate the victim for financial losses; that effective July 1, 1983, the permissible scope of victim impact evidence was vastly broadened to include evidence of the effect of the crime on the victim's family and made this type of evidence admissible in capital sentencing proceedings. Consequently, he argues the new statute rendered the act of which he was found guilty punishable in a manner in which it was not punishable when it was committed.

In our view Grandison has misread the law in existence prior to July 1, 1983. Article 41, § 124 of the Maryland Code was not limited to compensation to a victim for financial losses. By its terms the act provided:

"(c)(2)(i) The presentence investigation shall include a victim impact statement, if:

"1. The defendant, in committing a felony, caused physical, psychological, or economic injury to the victim; or

. . . . . .

(3) A victim impact statement shall:

(i) Identify the victim of the offense;

(ii) Itemize any economic loss suffered by the victim as a result of the offense;

(iii) Identify any physical injury suffered by the victim as a result of the offense along with its seriousness and permanence;

(iv) Describe any change in the victim's personal welfare or familial relationships as a result of the offense;

(v) Identify any request for psychological services initiated by the victim or the victim's family as a result of the offense; and

(vi) Contain any other information related to the impact of the offense upon the victim that the court requires."

It is clear, then, that considerations other than financial losses were allowed. The law as changed in 1983 specifically provided for use of the statement in death penalty cases and inserted "or the victim's family" in subparagraph (vi) of paragraph (3) in subsection (c) and added a new paragraph (4) which is not pertinent here. We believe the prior law was broad enough to have allowed the information now specifically set out in the current law. Consequently, we see no validity to Grandison's *ex post facto* argument. Furthermore, the 1983 amendment to Article 41, § 124 was only procedural and ameliorative. The change simply set forth an additional source from which victim impact information could be obtained, namely, the victim's family. The new statute does not change the quantum of punishment attached to the crime; hence, the current law is no more onerous to Grandison than it was prior to its amend-

ment. *See Tichnell v. State*, 287 Md. 695, 734–37, 415 A.2d 830, 850–52 (1980) (*Tichnell I*). Accordingly, we think it clear that the prohibitions against *ex post facto* laws were not violated in this case.

XXVI

Right of Jury to Extend Mercy at Sentencing

[52] Grandison complains that the jury in a death penalty sentencing proceeding has the right to show mercy and compassion in its sentence determination and the trial judge erred in not so allowing.

Building on former Md. Rule 759 f,[26] which was in force at the time of his sentencing, Grandison argues that nothing in the death penalty statute prohibits the exercise of compassion or mercy pursuant to the rule. Section f of the rule states:

"f. *Recommendation of Mercy.*

A jury may attach to its verdict a recommendation to the court to show mercy to a defendant. The recommendation is not binding upon the court."

The issue arose because of two circumstances that occurred during the proceedings. First, during voir dire of prospective jurors each was asked individually whether after listening to all the evidence and to what the judge said the law was, and having become convinced that based thereon the law required the death penalty, they would be able to give the death penalty. Second, Grandison requested the trial judge give the following instruction:

"The State alleges that the following aggravating circumstance applies in this case:

> The Defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration.

Unless you find beyond a reasonable doubt that this particular aggravating circumstance exists, you must mark 'No' in the space opposite that aggravating circumstance in Section I of the sentencing form, and you may not consider that factor in determining the appropriate sentence.

Should you believe that the State has established beyond a reasonable doubt that this aggravating factor exists and is sufficient in your minds to call for the penalty of death, then it is proper for you to exercise your own moral, factual and legal judgment in determining whether that circumstance is sufficient in your minds to call for the punishment of death."

He also requested that the jury be instructed:

"You need not find a mitigating circumstance in order to impose a sentence of life imprisonment. Nothing in the law forbids you from extending mercy out of compassion or belief that life imprisonment is sufficient punishment under all the circumstances."

The trial judge overruled Grandison's objection on the voir dire issue and denied the two requested instructions listed above. Keeping in mind that § 413(g)(8) of Art. 27 specifically allows the jury to set forth in writing any other facts which it finds as a mitigating circumstance, it strikes us that indeed there is ample provision for the jury to show compassion or mercy, albeit based on articulated facts. In our view this comports with the mandates of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). *See also Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In *Gregg*, the Court stated in part:

"*Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the

26. Now Rule 4-327(e).

risk of wholly arbitrary and capricious action."

428 U.S. at 189, 96 S.Ct. at 2932, 49 L.Ed.2d at 883.

Not only does the Maryland death penalty statute pass constitutional muster, *Tichnell v. State*, 287 Md. 695, 415 A.2d 830, it is flexible enough to allow a jury to show compassion and mercy should the facts and circumstances of the case so warrant. As stated in *Foster v. State*, 304 Md. 439, 475, 499 A.2d 1236, 1254 (1985):

"If the sentencing authority perceives anything relating to the defendant or the crime which causes it to believe that death may not be appropriate, it may treat such factor as a mitigating circumstance and decide that it outweighs the aggravating circumstance."

In accordance, Judge Simpkins instructed the sentencing jury:

"The eighth mitigating circumstance is, you will note on your sheet, any other circumstance. In Number Eight you should indicate any other mitigating circumstance or circumstances that you find from the evidence to exist. If from the evidence you found some other circumstance, other than those listed, you would mark that Number Eight yes, and then you would go and in the space provided below it, write in the nature of the circumstance that you had found."

Judge Simpkins later instructed the jury as to the weighing and balancing of all aggravating and mitigating circumstances. Through these instructions, the jurors were made aware that they could list and weigh any factor or circumstance as mitigating. Hence, the trial court provided the sentencer the opportunity to exercise its own moral judgment within the statutorily prescribed guidelines.

The Maryland death penalty statute is a delicate balance. It provides for an individualized determination of the defendant and the crime by allowing for consideration of a broad range of mitigating factors. *Calhoun v. State*, 297 Md. 563, 468 A.2d 45, *cert. denied*, — U.S. —, 104 S.Ct. 2374, 80 L.Ed.2d 846 (1983). But by requiring the articulation of these aggravating and mitigating circumstances, it prevents the sentencer from exercising unguided discretion. *Id.* To have instructed the jury as Grandison requested would have negated the carefully thought out sentencing procedure designed to meet the constitutional requirements set forth by the Supreme Court by injecting the risk of arbitrary and capricious action into the proceeding. Consequently, the court's refusal to give the requested instructions was not error.

Likewise, the objected to voir dire was an accurate statement of the law. In certain circumstances, the imposition of the death sentence is the only legally possible outcome under the statute. *See Stebbing v. State*, 299 Md. 331, 473 A.2d 903, *cert. denied*, — U.S. —, 105 S.Ct. 276, 83 L.Ed.2d 212 (1984). Consequently, the voir dire hypothetical, clearly designated as such, was not reversible error.

XXVII

Failure to Further Redact Presentence Report

Pursuant to Art. 27, § 413(c)(1)(iv), the State was prepared to offer at the sentencing hearing a presentence report, parts of which were being objected to by Grandison. (We observe that under subsection (iv) of section (c) above, a presentence investigation report, less any recommendation as to sentence, is admissible). Some of the objections were eliminated by agreement, but others were not resolved until brought to the trial judge's attention. It is from the ruling on these objections that Grandison complains.

[53] First, Grandison claims that failure to sustain his objection to a "detailed account of the State's evidence connecting [him] to narcotics transactions that formed the underlying basis for [his] federal drug convictions" was error under *Scott v. State*, 297 Md. 235, 465 A.2d 1126 (1983). This is so, he argues, because in *Scott* we said in part that section 413(c)(1)(iii) pre-

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XXVIII

• *Merger*

Appellant would next have us hold that under the required evidence test, *see, e.g., Thomas v. State*, 277 Md. 257, 267, 353 A.2d 240, 246 (1976), his convictions of accessory before the fact to murder and conspiracy to murder must merge for sentencing purposes. Nowhere does he indicate which conviction should merge into the other. We do not agree as the two offenses do not merge.

Grandison was charged with two counts of murder in the first degree through the form provided for in Art. 27, Sec. 616. He was also charged with conspiracy to murder. Since he was in prison at the time of the killings, his convictions for the murders obviously were based on his being an accessory before the fact.

[54, 55] It is clear that the substantive crime of murder is distinct from the crime of conspiracy to commit the murder. The argument is made here, however, that since Grandison's murder conviction was based on his being an accessory before the fact, his conviction for conspiracy to murder and the murder conviction should merge. What Grandison overlooks simply is that accessoryship is not a substantive crime but merely the mechanism by which culpability for the substantive crime is incurred. A completed crime is a necessary element. With conspiracy to murder, on the other hand, once the agreement to murder has been made, the crime is complete without any further action." In short, each of these crimes requires an element distinct from the other. Conspiracy to murder requires an agreement, while murder, regardless of whether one is convicted as an accessory or a principal, requires the completed crime. Thus it is apparent that the conspiracy to murder is a separate and distinct crime from the substantive crime itself.

[56] While we have not had occasion to discuss this specific issue previously, the United States Supreme Court and several of our sister jurisdictions have done so. In *Pereira v. United States*, 347 U.S. 1, 74 S.Ct. 358, 98 L.Ed. 435 (1954), the Supreme Court stated in pertinent part:

"Aiding, abetting, and counseling are not terms which presuppose the existence of an agreement.... Thus, the charge of conspiracy requires proof not essential to the convictions on the substantive offenses—proof of an agreement to commit an offense against the United States—and it cannot be said that the substantive offenses and the conspiracy are identical."

The Supreme Court of Maine, in addressing the identical issue, stated:

"It is, therefore, possible to aid or abet in the commission of a crime without at the same time having agreed to commit such crime. As stated by the United States Supreme Court:

Aiding, abetting, and counseling are not terms which presuppose the existence of an agreement. Those terms have a broader application, making the defendant a principal when he consciously shares in a criminal act, regardless of the existence of a conspir-

key." *Pereira v. United States*, 347 U.S. 1, 11, 74 S.Ct. 358, [364] 98 L.Ed. 435 (1954).

Accord: *Ottomano v. United States*, 468 F.2d 269, 271 (1st Cir.1972); *United States v. Tropiano*, 418 F.2d 1069, 1083 (2d Cir.1969) cert. denied 397 U.S. 1021, 90 S.Ct. 1262, 25 L.Ed.2d 530, 1970. This rule is merely an offshoot of the well-established principle that a conspiracy, as an inchoate offense, and the completed substantive offense are separate crimes. *Pereira v. United States, supra; Pinkerton v. United States*, 328 U.S. 640, 643-644, 66 S.Ct. 1180 [1181-1182], 90 L.Ed. 1489 (1945) (and cases cited therein)."

State v. Williams, 395 A.2d 1158 (Me. 1978).

Also, in *Rufer v. State*, 274 Ind. 643, 413 N.E.2d 880 (1980), it was stated:

"The petitioner contends that his convictions should merge, based on *Elmore v. State*, (1978) 269 Ind. 532, 382 N.E.2d 893. The record shows two separate offenses. *Grisleman v. State*, (1980) Ind. [274 Ind. 241] 410 N.E.2d 1293, 1297.

To prove a conspiracy, the State was required to show an agreement to commit a felony. Ind.Code § 35-1-111-1 (Burns 1975). The evidence shows that prior to their driving to the scene of the crime, the perpetrators concluded an agreement to commit the robbery.

To prove one guilty as an accessory before the fact, the prosecutor must show that the defendant aided or abetted the commission of a felony, or counseled, encouraged, hired, commanded, or otherwise procured a felony to be committed. Ind.Code § 35-1-29-1 (Burns 1975). The evidence of this offense consists of the testimony of an accomplice, Caron, and the petitioner's confession, which he repudiated at trial.

The record shows that while the conspiracy was completed before the robbery began, the jury could reasonably have inferred that the petitioner's aid and encouragement continued until the robbery victim was shot. *See Buhrt v. State*, (1980), Ind. [274 Ind. 270] 412 N.E.2d 70."

Accord, People v. Carter, 415 Mich. 558, 330 N.W.2d 314 (1982); *State v. Looney*, 294 N.C. 1, 240 S.E.2d 612 (1978); *State v. Branch*, 288 N.C. 514, 220 S.E.2d 495, cert. *denied*, 433 U.S. 907, 97 S.Ct. 2971, 53 L.Ed.2d 1091 (1975); and LaFave & Scott, Criminal Law § 62 (1972). We believe these authorities persuasive.

Accordingly, we find no merit to this contention.

XXIX

Failure to Excuse Juror

[57] This issue concerns the complaint of Grandison that the trial judge erred in not releasing a juror from further service because of an incident which occurred just before the sentencing proceeding was to begin. The record shows that one of the jurors gave a sealed envelope containing religious tracts to a bailiff with the request that he give it to Grandison after the trial was over. The bailiff advised the trial judge of the matter and was instructed to give the unopened envelope back to the juror; this was done. Nothing was said to Grandison or anyone else until the next time the case came on for further proceedings. A hearing was held at which the bailiff and the juror were questioned by the State and Grandison. At this time the juror explained that she desired to give these tracts to Grandison because she was concerned about his soul; she wanted him to "get right with God". She also stated she had not discussed this matter with other jurors. The juror furthermore stated she had made no decision relative to the appropriate sentence Grandison should receive and could make that determination based on the the evidence and the law. Neither the State nor Grandison sought any relief from the court at this time, although the next day Grandison did move for a mistrial which the court denied.

was shot. *See Bukrt* v. Ind. [274 Ind. 370] 412

Carter, 415 Mich. 558, 1982); *State* v. *Looney*, E.2d 612 (1978); *State* v. 514, 220 S.E.2d 495, *cert.* 907, 97 S.Ct. 2971, 53 5); and LaFave & Scott, 62 (1972). We believe ersuasive.

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On appeal, Grandison does not argue error in the denial of his mistrial motion. He merely states that the trial judge should have *sua sponte* replaced the juror. We believe Grandison's argument lacks merit. It seems to us that the time to have voiced an objection to the juror's continued service was at the time the issue came up, when the court could have taken appropriate steps. In short, Grandison has waived any right to complain.

XXX

Comments of Trial Judge in Jury's Presence

[58] Grandison's next complaint involves the allegation that he was denied a fair trial because on three occasions the trial judge made comments in the jury's presence that implied that sufficient proof existed to find Grandison guilty. The first instance occurred when the court was asked if it had ruled on an objection made by Grandison to hearsay statements of the co-conspirators. The basis of the objection was that there had been no conspiracy yet shown and "because of all this hearsay evidence...." The court responded, "Yes, there has been." Grandison's standby counsel responded, "Note the objection, please." It is clear what the objection went to—the hearsay statements, not the court's comments. No further relief was sought by Grandison. While we do not approve of the court commenting in front of the jury as it did, we believe Grandison could have sought some corrective action by the trial judge, keeping in mind he had already advised the jury that his legal rulings should not be taken to indicate how he felt about the case.

The second incident occurred as the court was temporarily excusing the alternate jurors when the panel was given the case to decide guilt or innocence. The judge stated:

"However, there is a possibility, depending on what the sentence may be, that a juror may have to be called back—the jury may have to be called back later for a second hearing, as I told you once before."

It is obvious to us, as it must have been to anyone who heard this remark, that the court committed a slip of the tongue and nothing more. Taken in the context that the word "sentence" was used, the only logical understanding of what the court meant was to say depending on what the *verdict* may be. Furthermore, we do not glean any intent on the court's part to express any opinion as to what that verdict should be.

The third instance cited by Grandison came about while closing argument was being made by his standby counsel. After stating,

"I know that somebody in Baltimore County decided that three other people who were really involved in this thing—you all know that, because you voted that way—three other people are not going to get the death sentence—."

an objection was made by the State's Attorney, followed by this colloquy:

"MR. CRAWFORD [Standby Counsel]: I am surprised you didn't object before, Mr. Levitz.

THE COURT: I am too. A lot of this hasn't been in the evidence anywhere.

MR. CRAWFORD: I believe that every case that I have ever read with this type of thing said there is extreme latitude in a death case, and I would be permitted to go far beyond the evidence.

THE COURT: Extreme latitude. There is an end to all latitudes, Mr. Crawford.

MR. CRAWFORD: Is the Court ruling me out of order on this particular point?

THE COURT: No, sir, I am just saying, your obligation to your profession, try to hold it within the limits. That is all.

MR. CRAWFORD: I realize my obligation to my profession, Your Honor.

THE COURT: I say, keeping that in mind, hold this down within those limits.

MR. CRAWFORD: I am not quite certain I know the nature of Mr. Levitz's objection.

MR. LEVITZ: I would be glad to state the nature of my objection. The statement was not true.

THE COURT: Gentlemen, I don't think you are doing anybody any good by going into this. I think we all understand what the problem is.

MR. CRAWFORD: I am not certain I do, but I will drop that particular subject for the moment."

Grandison argues that the comments by the trial judge, in view of the unique status that he has, carry the potential for influencing the jurors. He further argues that the court's comments related to the weight of the evidence and materially affected his rights.

We agree with the State's argument that there was no error in the court's comment. Indeed there was a lack of evidence to support standby counsel's argument which intended to convey the impression that there was no uniformity throughout the State in the seeking of the death penalty in eligible cases. We find no error here.

XXXI

Use of Sentences of Co-conspirators as Mitigating Circumstance

[59] With respect to this issue Grandison, on appeal, argues another reason why the trial court erred in refusing to allow him to refer to the punishment received by three of his co-conspirators. Reference is made to the colloquy just discussed in the previous issue. Grandison argues, for the first time, that he was entitled to have the jury consider these sentences as mitigating factors in determining his sentence. It is clear from the above exchange that the defense voluntarily abandoned this line of argument. Throughout the remainder of Grandison's closing argument, it was never again mentioned. The right of appeal may be waived where there is acquiescence in the decision from which the appeal is taken or by otherwise taking a position inconsistent with the right to appeal. See *Lukas and Sprenkle v. State*, 272 Md. 113, 321 A.2d 534 (1974) and *Rocks v. Brosius*, 241 Md. 612, 217 A.2d 531 (1966). By dropping the subject and never again raising it, Grandison waived his right to appellate review of this issue.

XXXII

Use of Expunged Conviction for Purposes of Sentence

After the jury retired to deliberate on the appropriate sentence for Grandison's murder convictions, the trial judge proceeded to sentence him for his convictions on the conspiracy and handgun counts. During the course of making his sentencing statement the trial judge explained why he was imposing maximum sentences. In doing so he made reference to an expunged 1970 conviction, as well as other convictions, to explain that had Grandison had to serve those sentences he would have been in prison and the present murders would not have occurred. Grandison, of course, objects to the court referring to or considering the 1970 conviction. He contends that the trial judge disregarded Maryland law and the expungement order of the United States District Court. In our view we do not believe the trial judge was basing his sentences on the fact that Grandison had been sentenced to twenty years in 1970 and therefore should be given maximum sentences.

Furthermore, while Grandison does not invoke the Maryland expungement statute, Art. 27, § 739, we observe that § 735(b)(2) of Art. 27 makes clear that the statute does not apply to court records where written opinions have been published. Indeed, the expungement order here, by its terms, was applicable to the Warden, the Commissioner of the Baltimore City Police Department, and the Clerk of the Criminal Court of Baltimore. *See Grandison v. Warden*, 423 F.Supp. 112 (D.Md.1976). We also observe that this order did not prevent the Fourth

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Circuit from publishing an opinion on Grandison's later conviction for sodomy despite the use of the 1970 conviction for impeachment purposes. *See Grandison v. Warden*, 580 F.2d 1231 (4th Cir.1978), *cert. denied*, 440 U.S. 918, 99 S.Ct. 1239, 59 L.Ed.2d 469 (1979).

In short, we see no error here.

XXXIII

Imposition of Two Death Sentences

[60] Grandison next argues that "(p)resumably, the legislature intended that only one death sentence be returned in a case where more than one person was killed.... Moreover, the addition of the option to impose a second penalty unduly enhances the contract murder aggravating factor." We recently answered this argument. In *Evans v. State*, 304 Md. 487, 538, 499 A.2d 1261, 1288 (1985), we said in part:

"We find no such legislative intent. Each murder was clearly a separate offense. The readily apparent intent of the Legislature in the enactment of the capital punishment statute was to permit consideration of the death penalty under the egregious circumstances of multiple first degree murders. There is no indication of an intent to allow the imposition of that punishment as a sanction for one but not all of the offenses. *Cf., Thomas v. State*, 301 Md. 294, 333–334, 483 A.2d 6 (1984), *cert. denied*, — U.S. —, 105 S.Ct. 1856, 85 L.Ed.2d 153 (1985)."

We deem what we said in *Evans* to be dispositive here.

XXXIV

Sufficiency of the Evidence

[61] The next ground of complaint raised by Grandison relates to the sufficiency of the evidence to sustain the guilty verdicts. He asserts that the State did not prove that he entered into an agreement with Evans whereby he would pay Evans to kill the Piechowiczes. What was lacking, he asserts, was evidence that he was connected to the criminal enterprise or had actually participated in the crime itself. We disagree.

Having charged Grandison with conspiracy to murder Scott and Cheryl Piechowicz, first degree murder of both Scott Piechowicz and Susan Kennedy, and use of a handgun in the commission of a crime of violence, it was incumbent on the State to prove these charges beyond a reasonable doubt. Being aware that Grandison, who was incarcerated at the time of the murders, could not have been the actual killer, the State of necessity had to prove that Grandison made an agreement with someone else to be that actual killer and the agreement had to call for remuneration or promise thereof. *See* Art. 27, § 413(d)(7). Grandison argues that the State fell short of its obligation. We have thoroughly reviewed the record and are satisfied that there was sufficient evidence to have allowed the jury to find an agreement between Grandison and Evans to have Scott and Cheryl Piechowicz killed so they would not be available as witnesses against Grandison in his federal drug trial. Certainly the record is replete with statements from co-conspirators, to each other as well as to third persons, the import of which leads elucidatively to the conclusion that Grandison hired Evans to kill the Piechowiczes. Grandison argues, however, that there was no corroboration of Charlene Sparrow's testimony. We think he is wrong. There was testimony from others, not co-conspirators, which did corroborate parts of her testimony. For example, the Baltimore City Jail security officer Drewery testified that Janet Moore and Evans visited Grandison on April 26, 1982 as testified to by Sparrow; Theresa Purdie testified about seeing Kelly, Moore, Sparrow and Evans at her residence at which time Grandison phoned Evans; she also testified that Rodney Kelly and Grandison were friends. Finally, Calvin Harper testified that Kelly showed him a machine pistol which he later saw Kelly give to Evans. He also testified that Kelly had told Mike Queen to get $500.00 from

his house, an amount referred to as being given to Evans.

It is settled that not much in the way of corroboration of the testimony of a co-conspirator is required. *See Brown v. State*, 281 Md. 241, 378 A.2d 1104 (1977), where Chief Judge Murphy said, for the Court, in part:

"Not much in the way of evidence corroborative of the accomplice's testimony has been required by our cases. We have, however, consistently held the view that while the corroborative evidence need not be sufficient in itself to convict, it must relate to material facts tending either (1) to identify the accused with the perpetrators of the crime or (2) to show the participation of the accused in the crime itself. *See Wright v. State*, 219 Md. 643, 150 A.2d 733 (1959). If with some degree of cogency the corroborative evidence tends to establish either of these matters, the trier of fact may credit the accomplice's testimony even with respect to matters as to which no corroboration was adduced. *McDowell v. State*, 231 Md. 205, 189 A.2d 611 (1963). That corroboration need not extend to every detail and indeed may even be circumstantial is also settled by our cases. *Nolan v. State*, 213 Md. 298, 131 A.2d 851 (1957); *Brown v. State*, 210 Md. 301, 123 A.2d 324 (1956). We have steadfastly adhered to these principles over the years since *Luery* was decided. *See State v. Foster*, 263 Md. 388, 283 A.2d 411 (1971); *Strong v. State*, 261 Md. 371, 275 A.2d 491 (1971); *Veney v. State*, 251 Md. 159, 246 A.2d 608 (1968); *Boggs v. State*, 228 Md. 168, 179 A.2d 338 (1962); *Mulcahy v. State*, 221 Md. 413, 158 A.2d 80 (1960); *Early v. State*, 13 Md.App. 182, 282 A.2d 154 (1971).

In the instant case we believe the testimony of Charlene Sparrow was adequately corroborated and sufficient to identify Grandison with the perpetrators of the crime. There is no merit to this contention.

Grandison also raises several issues which have previously been raised and decided by the Court. These issues and our responses thereto follow.

XXXV

In providing for the sentence of death by administration of lethal gas, the Maryland capital punishment scheme violates the Eighth and Fourteenth Amendments of the United States Constitution and Articles 16 and 25 of the Maryland Declaration of Rights.

This argument was made and rejected in *Calhoun v. State*, 297 Md. 563, 612-17, 468 A.2d 45, 68-70 (1983).

XXXVI

The sentence of death is imposed so arbitrarily and infrequently in Maryland as to constitute cruel or unusual punishment under State law.

We reject this argument. *See Stebbing v. State*, 299 Md. 231, 373, 473 A.2d 903, 924, *cert. denied*, — U.S. —, 105 S.Ct. 276, 83 L.Ed.2d 212 (1984); *Johnson v. State*, 292 Md. 405, 436, 439 A.2d 542, 560 (1982).

XXXVII

The Maryland capital punishment statute unconstitutionally placed the burden of proof to show mitigation on the accused.

In *Foster v. State*, 304 Md. 439, 499 A.2d 1236 (1985), we were concerned with this same contention. In response thereto we stated:

"Mrs. Foster, in arguing that the Maryland statute is unconstitutional with respect to a 'defendant's burdens,' also appears to challenge that portion of § 413(g) which provides that if the jury (or court if the defendant so elects) finds beyond a reasonable doubt that one or more of the statutory aggravating circumstances exist, 'it shall then consider whether, based upon a preponderance of the evidence, any' mitigating circumstances exist. As pointed out in *Tichnell I* and discussed above, this provision does

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not expressly put any burden upon the defendant. But, because § 413(g) does not require the State to disprove the existence of mitigating circumstances, it does place the risk of nonproduction and nonpersuasion on the defendant.

The Court in *Tichnell I*, 287 Md. at 730-734, 415 A.2d 830, dealt with this issue in detail, holding that not placing a burden on the prosecution to prove beyond a reasonable doubt the absence of mitigating circumstances was consistent with *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and *Mullaney* v. *Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), was in accord with the principles articulated in *Patterson* v. *New York*, 432 U.S. 197, 97 S.Ct. 2319, 53 L.Ed.2d 281 (1977), and was supported by cases in other states. In *Tichnell I*, 287 Md. at 732, 415 A.2d 830, we quoted from *Patterson*, 432 U.S. at 209, 97 S.Ct. at 2326, that:

> 'To recognize at all a mitigating circumstance does not require the State to prove its non-existence in each case in which the fact is put in issue, if in its judgment this would be too cumbersome, too expensive, and too inaccurate.'

Generally a defendant in a capital sentencing proceeding will have greater knowledge concerning the presence or absence of mitigating circumstances than the State. Moreover, because of the virtually unlimited scope of what may be deemed by the jury to be a mitigating circumstance under § 413(g)(8), it would be unreasonable to insist that the State establish the absence of such mitigating factors.

We adhere to our prior holdings that § 413(g) comports with constitutional requirements."

See also Colvin v. *State*, 299 Md. 88, 126, 472 A.2d 953, 971, *cert. denied*, —— U.S. ——, 105 S.Ct. 226, 83 L.Ed.2d 155 (1984) and *Stebbing*, 296 Md. 331, 473 A.2d 903, *cert. denied*, —— U.S. —— 105 S.Ct. 276, 83 L.Ed.2d 212 (1984).

XXVIII

The indictment should have been dismissed on the grounds that the State prosecution was in violation of double jeopardy principles.

We decline to reconsider our earlier rejection of this argument. *See Evans and Grandison* v. *State*, 301 Md. 45, 481 A.2d 1135 (1984), *cert. denied*, —— U.S. ——, 105 S.Ct. 1411, 84 L.Ed.2d 795 (1985).

XXXIX

The failure to instruct the jury on the consequences of a failure to reach a verdict on sentence within a reasonable time was reversible error.

[62] We adopt what we stated in *Calhoun*, 297 Md. 563, 468 A.2d 45, to the effect that no instruction of the effect of a deadlock was required when the jury reaches a decision within a reasonable time. In this case, after many days of trial, the jury reached its verdict in one and one-quarter hours. In our view this was not an unreasonable amount of time.

XL

Denial of Motion for Judgment of Acquittal as to the Murder of Susan Kennedy

[63] The gist of Grandison's argument here is that as to the murder of Susan Kennedy his motion for judgment of acquittal should have been granted. This is so, he contends, because the State maintained that Kennedy was murdered by mistake and for him to have been legally convicted of that murder the State would have been required to prove be "initiated, arranged, coordinated, commanded or contracted Kennedy's murder."

In our view the doctrine of "transferred intent," recognized in Maryland, is as applicable here as it was in *Gladden* v. *State*, 273 Md. 383, 330 A.2d 176 (1974). In *Gladden*, Judge O'Donnell said for the Court

"Put another way, 'If one intends injury to the person of another under circumstances in which such a mental element constitutes *mens rea*, and in the effort to accomplish this end he inflicts harm upon a person other than the one intended, he is guilty of the same kind of crime as if his aim had been more accurate.' In such cases all the components of the crime are present. The physical element which consists of a certain general mental pattern is not varied by the particular person who may be actually harmed." *Id.* at 404, 230 A.2d at 188 (footnote omitted).

The same statement is applicable here. Susan Kennedy's death was the result of a wilfull, deliberate, and premeditated intent to kill for which Grandison is responsible. There was no error in denying the motion.

XLI

Was Death Penalty Improperly Imposed

[44] Grandison argues that because the death penalty can only be imposed upon a person convicted of first degree murder as a principal in the first degree, and because he was not a principal in the first degree but only an accessory to the murders of Piechowicz and Kennedy, the death penalty was improperly imposed. There is no merit to this argument.

Art. 27, § 413(e)(1) provides that the terms "defendant" and "person", except as those terms appear in subsection (d)(7), include only a principal in the first degree. Subsection (d)(7) of section 413 provides as an aggravating circumstance, "The defendant engaged or employed another person to commit the murder and the murder was committed pursuant to an agreement or contract for remuneration or the promise of remuneration." Thus the legislature has by these provisions made a defendant in Grandison's position subject to the death penalty despite his being an accessory. The sentences of death were not inappropriate.

XLII

The Admission of an Assistant U.S. Attorney and Agent Foley's Testimony

Grandison contends here that the entire testimony of an Assistant U.S. Attorney and that of Agent Foley should have been stricken on the grounds of hearsay. Grandison relies for argument on this issue on the argument he made in Issue XV above. We likewise adopt here what we stated in response to Issue XV and find no error.

JUDGMENTS AFFIRMED.

In re LOUIS S., Leroy F., Russell P., Joseph B. and Wayne B.

No. 14, Sept. Term, 1986.

Court of Appeals of Maryland.

April 1, 1986.

Certiorari to the Court of Special Appeals (Circuit Court for Baltimore City; David B. Mitchell, Judge).

Submitted to MURPHY, C.J., and SMITH, ELDRIDGE, COLE, RODOWSKY, COUCH and McAULIFFE, JJ.

PER CURIAM.

ORDER

The Court having considered and granted the petition for a writ of certiorari, in the above entitled case, it is this 1st day of April, 1986

ORDERED, by the Court of Appeals of Maryland, that the judgments of the Court of Special Appeals be, and they are hereby, reversed and the cases remanded to that Court with directions to remand these cases to the Circuit Court for Baltimore

ORIGINAL

No. 85-7165

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ANTHONY GRANDISON, SR.,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

STEPHEN H. SACHS,
Attorney General of Maryland

DEBORAH K. CHASANOW,
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Counsel for Respondent

QUESTIONS PRESENTED

1. Whether Petitioner's waiver of counsel extended through sentencing?

2. Whether the trial court abused its discretion in denying Petitioner's request to speak to Rodney Kelly alone?

3. Whether the Maryland Court of Appeals has consistently interpreted the Maryland Death Penalty Statute so as to avoid offending the Eighth and Fourteenth Amendments to the Federal Constitution?

4. Whether the Maryland Capital Sentencing Statute and the trial proceedings adequately allowed the jury to show compassion and mercy?

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No. 85-7165

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

ANTHONY GRANDISON, SR.,

Petitioner

v.

STATE OF MARYLAND,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

The State of Maryland, Respondent, by its attorneys, Stephen H. Sachs, Attorney General of Maryland, and Deborah K. Chasanow, Assistant Attorney General, requests that the Petition for Writ of Certiorari to the Court of Appeals of Maryland be denied.

STATEMENT OF THE CASE

The Court of Appeals' decision was filed on April 1, 1986. Petitioner recently filed a Motion for Reconsideration in that Court on June 20, 1986, along with a request for permission to file it more than 30 days after the original

opinion. It was denied by the Court of Appeals for want of jurisdiction on July 9, 1986.

With that addition, Respondent accepts Petitioner's Statement of the Case as outlining the salient events in this prosecution. Some portions of Petitioner's Statement of Facts, however, are inaccurate and misleading and Respondent is unable to accept it in its entirety.

STATEMENT OF FACTS

Scott Piechowicz and Susan Kennedy were shot to death on April 28, 1983, as they worked at the Warren House Motor Hotel in Baltimore County, Maryland. Petitioner was convicted of orchestrating their murders from the Baltimore City Jail, by hiring Vernon Evans to kill them in return for $9,000.00, by arranging for Rodney Kelly to provide the weapon, and by directing Janet Moore to facilitate their efforts.

Petitioner was in City Jail awaiting trial on federal charges in the spring of 1983. Scott Piechowicz and his wife Cheryl were to be witnesses in that case. On March 11 and 14, 1983, a suppression hearing was held in federal court on Petitioner's motion to exclude their identifications of him. Both Scott and Cheryl testified. Janet Moore, Petitioner's common-law wife, was there and spoke to Cheryl.

On March 14, Petitioner wrote to Janet Moore, telling her about his trial preparation and stating:

> "I might have you take a friend of mine, name Short, over there to see one of the kids, probably Rodney or Mike, because I want him to take care of something to be on the safe side."

The motion to suppress was denied on April 22, 1983 and an order was mailed to all parties. Trial was scheduled to commence at the beginning of May. The State's evidence of the ensuing events was presented through the testimony of Charlene Sparrow (Evans' girlfriend), Calvin Harper (who accompanied Rodney Kelly when he showed the murder weapon to Evans), and Theresa Purdie (the mother of Petitioner's son).

On April 26, 1983, Petitioner called Evans on the telephone and, at Petitioner's request, Evans went to City Jail with Janet Moore to visit him. Evans, Moore, and Sparrow then went to find Rodney Kelly. They met at Purdie's apartment where Petitioner spoke to them on the phone. The conversation included discussion about protective glass at a motel.[1]

Moore, Evans, and Sparrow then went to the Warren House, where Sparrow unsuccessfully sought to rent a room. She did make a reservation for April 27 and she and Evans stayed at the motel the night of April 27.

On the afternoon of April 27, Kelly showed Evans a gun that he would use. After Evans ascertained that a white couple was on duty on the morning of April 28 and spoke to Moore, Sparrow rented the room for another day. She and Evans left the motel. Kelly brought the weapon to Evans.

---

1 Theresa Purdie told them that Petitioner said for Kelly to give her some money.

Evans entered the motel and, when he came running to the car where Sparrow was waiting, the gun was smoking.[2] Kelly retrieved the gun that evening and gave Evans $500.00. Evans looked for Kelly early in May, and received another $1,000.00 from him on May 2, 1983.

The victims of the shooting were Scott Piechowicz and his sister-in-law Susan Kennedy. Susan had taken her sister Cheryl's place at work that day.

Waiver of Counsel

Petitioner was not represented by counsel in the trial court. From the arraignment on July 19, 1983, Petitioner insisted on representing himself. Both Judge Fader in Baltimore County and Judge Simpkins in Somerset County thoroughly explained the right to counsel and the dangers of self-representation. The matter was discussed on July 19, 1983, September 7, 1983, November 9, 1983, November 23, 1983, and February 3, 1984. More than two and one-half months before trial, Judge Simpkins explained to Petitioner that a death penalty case involved a bifurcated procedure, with trial followed by sentencing. He made clear that the right to an attorney that Petitioner was waiving included having someone help with mitigation of sentence and in preparing for sentencing. Petitioner chose self-representation, but claimed the right to appointment of "standby" counsel to assist him.

---

[2] Evans, who had earlier said he was going to kill someone at the motel, admitted to Sparrow that he had shot the victims "from the waist up." He told her he was to get $9,000.00 for killing them.

After many discussions including the parties and the Public Defender, Judge Fader originally denied Petitioner's request. After removal, however, Judge Simpkins did appoint an attorney as standby counsel. Despite the presence of standby counsel, however, Petitioner conducted his case from jury selection to argument. Any participation by the attorney was clearly done only with Petitioner's consent.

On May 28, 1984, the first date scheduled for sentencing, Petitioner informed the trial judge that he and standby counsel had agreed to have standby counsel "handle" sentencing. He claimed a "right" under Faretta v. California, 422 U.S. 806 (1975), to terminate self-representation whenever he wished. The trial judge thought the matter was discretionary with the court. Although asserting a right to counsel, all that Petitioner wanted was additional time for standby counsel to prepare. They asked for an additional week and were granted an eight day postponement. In that sense, Petitioner obtained all the relief he requested. Sentencing proceeded with counsel acting in a standby role and not as representing Petitioner.

Interview with Rodney Kelly

Despite having been with Rodney Kelly throughout the federal trial charging civil rights violations arising from this killing, Petitioner wanted to meet with Kelly alone to interview him prior to putting him on the witness stand. Because of the security arrangements for Kelly, who was serving a life sentence plus 50 years for his part in the

murders and was charged with another murder while in prison in Lewisburg, the trial court refused to let them "get together and discuss matters." Petitioner had been warned that self-representation would be difficult because of his incarceration and was told that standby counsel was available to act as a go-between.

Unfettered Exercise of Mercy

Petitioner has maintained from the beginning of the proceedings that the jurors could arbitrarily return a sentence of life imprisonment even if their findings and the weighing of circumstances led to return of a death sentence. In line with that, he objected at times when potential jurors were asked if they would/could follow the law. He also requested instructions that essentially told the jury that it could ignore the part of the law setting forth the balancing process and the part requiring the articulation of mitigating factors. Nowhere at trial did he base his view on Maryland Rule 759(f) (current 4-327(e).) Rather the instruction requests rested on out-of-state authority and Justice Stevens' individual opinion respecting the denial of certiorari in Smith, Williams, and Pinch v. North Carolina, 459 U.S. 1056 (1982).

ARGUMENT

I.

PETITIONER'S WAIVER OF HIS SIXTH AMENDMENT RIGHT TO THE ASSISTANCE OF COUNSEL EXTENDED THROUGH SENTENCING.

Petitioner does not complain, as indeed he could not, that his waiver of counsel was ineffective. His claim is simply that he could terminate that waiver unilaterally and insist on counsel for sentencing. Petitioner, however, is wrong in viewing the sentencing proceeding as a new "case" for right to counsel purposes. Once self-representation was properly elected, Petitioner could legitimately be held to it. This Court clearly conceives of sentencing as a stage of a criminal proceeding at which counsel is guaranteed, Mempa v. Rhay, 389 U.S. 128, 134 (1967), and not a new case. In Mempa, Justice Marshall commented: "We assume that counsel appointed for the purpose of the trial or guilty plea would not be unduly burdened by being requested to follow through at the deferred sentencing state of the proceeding." 389 U.S. at 137. The recent decision in Lockhart v. McCree, 476 U.S. ___, 106 S.Ct. ___, 90 L.Ed.2d 137, 153 (1986), similarly refers to "the guilt and penalty phases of a capital trial." It follows that a defendant who elects self-representation for a case has made an election for all stages of the proceeding.

A pro se defendant has no right to "hybrid" representation and:

> "A defendant does not have a constitutional right to choreograph special appearances by counsel." McKaskle v. Wiggins, ___ U.S. ___, 104 S.Ct. 944, 953-54, 79 L.Ed.2d 122 (1984).

The defendant Wiggins had a b.furcated trial and elected a jury for "the punishment phase." The court commented that he proceeded pro se at that "stage" as well, ___ U.S. at ___, 104 S.Ct. at 950, 79 L.Ed.2d at 131-32. Sentencing is obviously part of the same case initiated by the indictment and not a separate case for counsel purposes.

Many courts have examined the issue and concluded - categorically - that there is no right to counsel and to proceed pro se; United States v. Halbert, 640 F.2d 1000, 1009 (9th Cir. 1981) (the two rights are disjunctive, citing cases from the Second, Fourth, Fifth, and Ninth Circuits); United States v. Trapnell, 638 F.2d 1016, 1027 (7th Cir. 1980); United States v. Crowhurst, 629 F.2d 1297, 1301 (9th Cir. 1980). The appointment of standby counsel was entirely discretionary with the trial court and not based on any right of Petitioner. Had there been no standby appointed, no question would have arisen at sentencing, because there would have been no one available to participate in the continuation of the case. Standby counsel is appointed primarily to assist the court in conducting trial and to be available to take over a defense should a defendant's right to continued self-representation be forfeited by disruptive conduct. Nothing suggests that a defendant has the unfettered right to elect representation by counsel once a valid waiver of counsel has been made.

The presence of standby counsel, at Petitioner's express request, was more than the Constitution required. He had no

right to terminate self-representation at will, or to switch back and forth. He made his decision voluntarily and knowingly - and insistently - at the beginning of trial. The waiver of counsel extended through imposition of sentence.

II.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN DENYING PETITIONER'S REQUEST TO SPEAK TO RODNEY KELLY ALONE.

The Court of Appeals of Maryland upheld the trial court's discretionary decision not to allow a private, personal interview between Petitioner and Rodney Kelly on several grounds. First, it found the concern over security to be legitimate. Second, it found no prejudice to Petitioner from the condition that the interview be conducted through standby counsel, particularly in light of the fact that the two had ample opportunity to confer during the federal trial. Finally, it found that the absence of a proffer of Kelly's testimony precluded a finding of prejudice (Pet. App. 44-45).

Petitioner's attempt to turn a proper discretionary ruling into a denial of the right to proceed pro se is unavailing. Warned of the dangers of self-representation, Petitioner assumed the risk that his incarceration would interfere with his desires for presenting his case. Having failed to show why standby counsel could not even attempt the interview on Petitioner's behalf, Petitioner has failed to establish an abuse of discretion.

III.

THE ALLOCATION OF THE BURDEN OF PERSUASION UNDER THE MARYLAND CAPITAL SENTENCING STATUTE IS CONSTITUTIONAL.

Petitioner here essentially restates arguments made recently in Petitions for Writ of Certiorari by three other defendants sentenced to death in Maryland: Foster v. Maryland, No. 85-6650, Evans v. State, No. 85-6649, both cert. denied, June 30, 1986, and Huffington v. State, No. 85-6648, cert. denied, July 7, 1986.

Petitioner contends that the interpretation of Maryland's capital sentencing statute by the Maryland Court of Appeals in Foster v. State, 304 Md. 439, 499 A.2d 1236 (1985), violated both the Eighth and Fourteenth Amendments to the Federal Constitution. In support of these claims, Petitioner contends that the Maryland Court of Appeals' decision in Foster constituted a "reconstruction" of the statute which varied the burden of persuasion from that actually employed in his case. He contends that the procedure employed here placed the ultimate burden of persuasion upon him with regard to obtaining a life sentence, instead of death. However, a review of the Maryland Court of Appeals opinion in Foster, together with prior decisions interpreting Art. 27, §413 of the Maryland Annotated Code, reflects that the Foster opinion did not change the law. Rather, the opinion restated that which had been pronounced in Tichnell v. State, 287 Md. 695, 730, 415 A.2d 830 (1980), the first decision rendered by the Court of Appeals under the current death penalty statute. As

the law never changed, there was no unconstitutional vagueness, arbitrariness or capriciousness, or improper allocation of burden in Petitioner's case. As a result, review is unwarranted.

In Tichnell v. State, 287 Md. at 730, 415 A.2d at 849, the Maryland Court of Appeals stated:

> "Because the State is attempting to establish that the imposition of the death penalty is an appropriate sentence, the statute places the risk of nonpersuasion on the prosecution with respect to whether the aggravating factors outweigh the mitigating factors."

This holding was reiterated by the court in Trimble v. State, 300 Md. 387, 415 n.16, 478 A.2d 1143, 1157 n.16 (1984), cert. denied, ____ U.S. ____, 105 S.Ct. 1231, 84 L.Ed.2d 368 (1985), where it stated:

> "In Tichnell I, we also construed Section 413(h)(2), which provides that the trier of fact shall determine whether 'the mitigating circumstances outweigh the aggravating circumstances,' to place the burden of persuasion on the prosecution."

The holding of the Court of Appeals in Foster v. State, supra, did not constitute a deviation from this previously announced law. Rather, the Court merely reiterated that when evidence is weighed, no burden is imposed upon either party. In this ultimate balancing, if the aggravating factors outweigh the mitigating factors the sentence is death; if the mitigating factors outweigh the aggravating factors, the sentence is life; if the mitigating factors and aggravating factors are in a state of even balance, the appropriate sentence is life because the State (as the moving party) bears

the risk of nonpersuasion.[3] As there was no deviation from existing law, the Maryland Capital Punishment Statute is not overly vague in contravention of the Fourteenth Amendment, and does not result in the arbitrary and capricious imposition of sentence in violation of the Eighth Amendment.[4] There is simply nothing in the reiteration of prior holdings in the Foster opinion that would serve to violate the Federal Constitution.

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[3] In support of his contention under the Fourteenth Amendment, Petitioner cites Ashton v. Kentucky, 384 U.S. 195 (1966), and Hicks v. Oklahoma, 447 U.S. 343 (1980), for the proposition that a limiting construction cannot be applied to affirm the decision in the case in which the limitation was announced. The flaw in Petitioner's contention, aside from the fact that there was no reconstruction here, however, is that the Ashton restriction applies only where the new interpretation saves that which would have been unconstitutional. Assuming that the Foster decision transferred the burden of persuasion to the State, there remains no infirmity since imposing the burden on the defendant is not unconstitutional. See Proffitt v. Florida, 428 U.S. 242 (1976) (scheme in which death is presumed after one or more aggravating circumstances is found unless overridden by mitigating factors constitutional). Cf. Patterson v. New York, 432 U.S. 197 (1977).

[4] Petitioner's reliance upon Bouie v. City of Columbia, 378 U.S. 347 (1964), in asserting that at the time he was sentenced (prior to Foster) the statute was unconstitutionally vague is misplaced. In Bouie, the South Carolina appellate court expanded the definition of the trespass statute beyond its specific terms in order to find the evidence sufficient in Bouie's case. Here, on the other hand, the judicial interpretation was not contrary to the legislative enactment. See Stebbing v. Maryland, ___ U.S. ___, 105 S.Ct. 276, 280, 83 L.Ed.2d 212, 217 (1984) (Marshall, J., dissenting on denial of certiorari) (Maryland statute is silent as to burden on ultimate weighing). Moreover, the South Carolina courts had never interpreted the trespass statute to include Bouie's conduct until after Bouie's arrest. The Maryland Court of Appeals, on the other hand, had interpreted the statute with respect to burdens prior to Petitioner's trial.

Petitioner additionally contends that review of his case is warranted because he was tried under the interpretation of the law that existed prior to the Foster decision, an interpretation that he alleges is unconstitutional. However, as noted above, Foster did not initiate any change in the law. It was the law from the time of the first decision under the existing statute. As a result, his contention on this basis must be rejected.

He further asserts that even if the burden were properly allocated to the State, the statute is nevertheless unconstitutional because the ultimate weighing does not require a finding "beyond a reasonable doubt." However, Petitioner once again erroneously talks in terms of burden with respect to a weighing of one set of circumstances against another. As noted by the Maryland Court of Appeals, "ordinarily in such a balancing process, a court simply determines which side outweighs the other, without being concerned with how much or how clearly one side may outweigh the other." Foster v. State, 304 Md. at 477. The Court of Appeals had earlier rejected an identical contention in Tichnell v. State, 287 Md. at 732-733, 415 A.2d at 849-850, relying upon this Court's decision in Patterson v. New York, 432 U.S. 197 (1977). In Patterson, this Court

> "decline[d] to adopt as a constitutional imperative, operative country wide, that a state must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed;

> more subtle balancing of society's interests against those of the accused have been left to the legislative branch." 432 U.S. at 209-10.

Under the Maryland scheme, the State is required to prove beyond a reasonable doubt that the defendant is guilty of first degree murder, that he or she was a principal in the first degree or contracted for the murder of another, and that at least one aggravating factor is present. The defendant is then provided an opportunity to present evidence to help the jury find the existence of any mitigating factor established by a preponderance of the evidence.[5] It is then up to the sentencer to weigh the evidence in aggravation against the mitigating factors found to exist under a preponderance standard in order to determine the ultimate sentence. There is no unconstitutional allocation of burden or standard in this scheme. As a result, review of Petitioner's case is unwarranted.

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[5] The defendant has no obligation to produce evidence or prove mitigating factors. As stated in Foster, 304 Md. at 474, 499 A.2d at 1254: "[R]egardless of what evidence a defendant himself may or may not produce, or regardless of any mitigation argument he may or may not advance, if the jury perceives from the case a fact or circumstance concerning the crime or the defendant, which the jury deems to be mitigating, it may treat it as such. As to mitigation, it is only the risk of non-production or non-persuasion which the defendant bears."

IV.

THE MARYLAND CAPITAL SENTENCING STATUTE AND THE TRIAL PROCEEDINGS IN THIS CASE ADEQUATELY ALLOWED THE JURY TO SHOW COMPASSION AND MERCY, HAD IT BEEN SO INCLINED.

Petitioner's broad attack on Maryland procedures as precluding the exercise of mercy is seriously overstated. Not only does the law allow the exercise of mercy, but the precise instruction requested by Petitioner would have allowed the jurors to exercise their own "moral, factual and legal judgment in determining whether that [aggravating] circumstance is sufficient in [their] minds to call for the punishment of death."

The Court recently granted review in California v. Brown, No. 85-1563, where the California Supreme Court invalidated the use of an antisympathy instruction, at least where other standard instructions focused only on the crime, and did not include the defendant's background and character, as possible mitigating circumstances. People v. Brown, 709 P.2d 440, 453 (Cal. 1986) (en banc). Here, there was no antisympathy instruction given and the jury was told that it could consider anything about the crime or the defendant to be a mitigating circumstance. Petitioner's complaint is that the jury should have been told that it was free to extend mercy without stating why. He asks for too much. As the Court of Appeals said:

> "[I]t strikes us that indeed there is ample provision for the jury to show compassion or mercy, albeit based on articulated facts." App. 52.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Petition for Writ of Certiorari filed herein be denied, review being neither desirable nor in the public interest.

Respectfully submitted,

STEPHEN H. SACHS,
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Counsel for Respondent

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 15th day of July, 1986, the Brief in Opposition to the Petition for Writ of Certiorari was mailed to the court and copies thereof were mailed, postage prepaid, to Nancy L. Cook, Esquire, The American University, Cassell Annex, 4400 Massachusetts Avenue, N.W., Washington, D.C. 20016.

Deborah K. Chasanow
DEBORAH K. CHASANOW,
Assistant Attorney General

SUPREME COURT OF THE UNITED STATES

ANTHONY GRANDISON *v.* MARYLAND

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

No. 85–7165. Decided October 6, 1986

The petition for a writ of certiorari is denied.

JUSTICE MARSHALL, with whom JUSTICE BRENNAN joins, dissenting from denial of certiorari.

Petitioner Anthony Grandison was sentenced to death by an improperly instructed jury and did not have the benefit of representation at his sentencing hearing. Because I believe that the jury's instructions under the Maryland statute improperly shifted to petitioner the burden of disproving the appropriateness of his death sentence, and that the denial of a request for legal representation in the sentencing phase of a bifurcated capital proceeding constitutes a violation of the Sixth Amendment right to counsel, I dissent.

I

Petitioner was tried for murder, conspiracy to commit murder, and use of a handgun in the commission of a crime of violence, for hiring someone to kill two witnesses scheduled to testify against him in his trial on federal drug charges. The jury found petitioner guilty on all charges and sentenced him to death. Petitioner claims that the Maryland capital sentencing statute and the verdict sheet provided to the jury improperly imposed upon him the burden of proof at the sentencing phase. I continue to believe that this issue is worthy of review. See *Huffington* v. *Maryland*, —— U. S. —— (1986) (MARSHALL, J., dissenting from denial of certiorari); *Stebbing* v. *Maryland*, 469 U. S. 900 (1984) (MARSHALL, J., dissenting from denial of certiorari).

The State argues that petitioner's claim is foreclosed by a state court construction of the statute holding that the pros-

ecution bears the burden of persuasion. See *Foster* v. *State*, 304 Md. 439, 476–480, 499 A. 2d 1236, 1256–1257 (1985). In this case, however, the jury was provided with a verdict sheet that unambiguously directed the jurors to return a sentence of death *unless* mitigating circumstances outweighed aggravating circumstances. The Maryland Court of Appeals may construe the statute to avoid any constitutional difficulty. But the trial court's instructions and the verdict form submitted to the jury must reflect that construction. Here, the verdict form did not; the constitutional infirmity therefore remains undiminished.

II

At his arraignment, petitioner asserted the right to represent himself under *Faretta* v. *California*, 422 U. S. 806 (1975). Petitioner was informed of his right to counsel, the dangers of self-representation, and the advantages of having counsel to assist at trial and sentencing. Petitioner nonetheless chose to proceed pro se. He was granted the right to have "standby" counsel, but conducted his own defense. The jury returned a verdict of guilty on all counts.

At the first scheduled sentencing proceeding, petitioner asked the court to appoint the lawyer who had served as standby counsel to represent him in the sentencing proceeding. He also sought a continuance, since neither he nor his counsel was prepared to go forward. The court refused to terminate petitioner's self-representation, stating:

> "Once the decision is made regarding self-representation, if it is properly made prior to trial, the request to change rests solely within the discretion of the trial court. The right must be timely asserted. It must be asserted before the trial starts. Of course, this is not timely asserted. Whether we continue with it or not, what I am inclined to do about self-representation is leave it just like it is, and let [standby counsel] take over and handle the proceeding as standby counsel with Mr.

> Grandison's permission. Grandison will still be the attorney." Pet. for Cert. 8–9.

Moreover, the court instructed standby counsel, "Keep in mind, Mr. Crawford, you are not the attorney in this. Mr. Grandison is his own attorney. You are just kind of a law clerk." Pet for Cert. 9. The court granted an eight-day continuance; at the reconvened sentencing hearing, it again made clear that Grandison was representing himself, albeit with the assistance of standby counsel.

Assuming for the sake of argument that in a *non*-bifurcated criminal proceeding a trial judge could in some circumstances deny a defendant who initially asserted his right to represent himself the right to later change his mind and proceed with counsel, such a rule would not imply that a waiver of counsel in the guilt phase of a capital proceeding requires a defendant to proceed pro se, against his will, in the sentencing phase. The Maryland Court of Appeals cursorily dismissed petitioner's claim that, because capital sentencing constituted a separate trial, he was entitled to make a new decision about whether he wanted counsel or not. *Grandison* v. *State*, 305 Md. 685, 752, 506 A. 2d 580, 613 (1986). I find this claim worthy of considerably more attention than the Maryland court gave it.

In *Bullington* v. *Missouri*, 451 U. S. 430 (1981), this Court held that the Double Jeopardy clause applied to the sentencing phase of a bifurcated trial. It did so because it found that a sentencing hearing was like a separate trial. "The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment." *Id.*, at 438. Under the Maryland statute, Md. Crim. Law Code Ann. §413 (1982 & Cum. Supp. 1985), sentencing is similarly a separate adversarial proceeding, see §413(a). It may require selection of a new jury, see §413(b)(2)(i)–(iv). Evidence is offered, §413(c)(1); the parties may present argument, §413(c)(2); the jury is instructed,

§ 413(c)(3); and the jury deliberates and determines sentence. The Maryland proceeding is in all respects a separate trial on the issue of punishment. The waiver of the right to counsel at the first "trial" on guilt or innocence should therefore have no more bearing on a defendant's right to counsel in the sentencing phase than it would on that defendant's right to counsel in a separate trial on related crimes. It should under no circumstances irrevocably bind a defendant in the sentencing phase.

The trial court articulated no basis for refusing petitioner's request to appoint counsel. Even at midtrial in a nonbifurcated proceeding, a trial court's unexplained refusal to permit a defendant to revoke his assertion of the right to self-representation would surely constitute an abuse of discretion. A trial court cannot insist that a defendant continue representing himself out of some punitive notion that that defendant, having made his bed, should be compelled to lie in it. Yet in this case, where petitioner's right to counsel was triggered anew by the start of a new trial on the issue of punishment, the trial court refused, entirely without justification, to permit him to assert that right to counsel. This refusal deprived petitioner of his constitutional right to be represented during his sentencing hearing. Accordingly, I dissent.*

JUSTICE SCALIA took no part in the consideration or decision of this petition.

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*I note in addition that petitioner raises issues related to those that will be before the Court in *California* v. *Brown*, 85–1563, to be argued later this Term. I would at the very least delay disposition of this petition until that case is decided.